

## **A Right to Know: Why Congress Should Recognize that the Freedom of the Press Does Not Allow “Public Speakers” to Hide Behind Wiretapping Laws**

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### **I. INTRODUCTION**

On May 17, 2012, Republican presidential candidate Mitt Romney shut out reporters from a campaign fundraising event in Florida.<sup>1</sup> Fortunately for the newspapers and blogs those reporters represented, someone who did have a door pass to the insiders' event set up a video camera out of plain view and recorded former Massachusetts Governor Romney's now infamous “47 percent” speech.<sup>2</sup> During that speech, the presidential candidate made comments alleging that nearly half of all Americans are dependent on government entitlements and believe it is the government's responsibility to care

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<sup>1</sup> Brian Ross, *Who Recorded Mitt Romney?*, ABC: THE BLOTTER (Sept. 18, 2012), <http://abcnews.go.com/Blotter/recorded-mittromney/story?id=17266676#.UGrdLUJ8vwx>.

<sup>2</sup> *Id.*

for them.<sup>3</sup> Mr. Romney's speech, to no surprise, did not move him any closer to winning the presidency.<sup>4</sup>

But what could Mr. Romney do about it? Politically speaking, probably not much. The damage was done the moment the speech hit the Internet in a video released by Mother Jones magazine<sup>5</sup> and subsequently scattered in the blogosphere. In addition to the mainstream media, blogs from *The Daily Beast* to *The Hollywood Gossip* posted the video on their websites.<sup>6</sup>

Nevertheless, the surreptitious nature of the recording and the method of its dissemination to the public sparked debate about its

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<sup>3</sup> *Id.*

<sup>4</sup> Mr. Romney lost 1.6 points to President Obama in the *New York Times*' FiveThirtyEight "now-cast" poll, which is a compilation of recent national and state polls, during the week and a half after the "47 percent" video went viral. Nate Silver, *Sept. 27: The Impact of the '47 Percent'*, FIVETHIRTYEIGHT: NATE SILVER'S POL. CALCULUS (Sept. 28, 2012, 8:30 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/09/28/sept-27-the-impact-of-the-47-percent/>. Mr. Romney eventually lost the 2012 presidential election to incumbent Barack Obama. *2012 Presidential Election Results*, WASH. POST: CAMPAIGN 2012, <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president/> (last updated Nov. 19, 2012). President Obama received 332 electoral-college votes and 50.6% of the popular vote, while Mr. Romney received 206 electoral-college votes and 47.8% of the popular vote. *Id.* The rest of the popular vote went to minor-party candidates. *Id.*

<sup>5</sup> David Corn, *WATCH: Full Secret Video of Private Romney Fundraiser*, MOTHER JONES (Sept. 18, 2012, 11:30 AM), <http://www.motherjones.com/politics/2012/09/watch-full-secret-video-private-romney-fundraiser> (containing the unedited forty-nine-minute video of Mr. Romney's "47 percent" speech).

<sup>6</sup> See, e.g., Free Britney, *Mitt Romney Stands By "47 Percent" Comments: Will Video Derail His Campaign?*, HOLLYWOOD GOSSIP (Sept. 18, 2012, 6:03 AM), <http://www.thehollywoodgossip.com/2012/09/mitt-romney-stands-by-47-percent-comments-will-video-derail-his>; Master Chief, *Mitt Romney "47 Percent"—Full Video Footage from Private Fundraiser Released*, GOSSIPONTHIS.COM (Sept. 18, 2012), <http://gossiponthis.com/2012/09/18/mitt-romney-47-percent-full-video-private-fundraiser-released>; Peter Kafka, *Mitt Romney Goes Viral*, ALL THINGS D (Sept. 18, 2012, 7:59 AM), <http://allthingsd.com/20120918/mitt-romney-goes-viral/>; *Mitt Romney's '47 Percent Disaster': A Campaign Killer?*, WEEK (Sept. 18, 2012), <http://theweek.com/article/index/233456/mitt-romneys-47-percent-disaster-a-campaign-killer>; James Braxton Peterson, *Mitt Romney's 47 Percent Not Who GOP Wants You to Think They Are*, DAILY BEAST (Sept. 27, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/09/27/mitt-romney-s-47-percent-not-who-gop-wants-you-to-think-they-are.html>; Brandon K. Thorp, *Off-Record Mitt Romney Says '47 Percent' of Americans Are 'Entitled': Video*, TOWLEROAD (Sept. 16, 2012, 9:00 AM), <http://www.towleroad.com/2012/09/off-record-mitt-romney-says-47-percent-of-americans-are-entitled-video.html> (audio only).

legality.<sup>7</sup> This debate has centered on whether the recording violated 18 U.S.C. § 2510 *et seq.* (“Wiretap Act”) or the Florida wiretap statute.<sup>8</sup> In a nutshell, these two statutes, along with similar state wiretapping laws, prohibit the recording and dissemination of oral communications when the speaker has a justifiable expectation that his or her communications will not be intercepted.<sup>9</sup> However, a much larger question hovers overhead.

Assuming, *arguendo*, that such a surreptitious recording violated the Wiretap Act and the Florida wiretapping statute,<sup>10</sup> does the First Amendment protect both the person who recorded Mr. Romney’s speech and the blogs that disseminated it? The Supreme Court has stated that “generally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects on [the] ability to gather and report the news.”<sup>11</sup> However, the Court has also stated, “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit

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<sup>7</sup> See, e.g., Jeffrey P. Hermes, *A Camera Records in Boca, Part One*, DIGITAL MEDIA L. PROJECT, BERKMAN CTR. FOR INTERNET & SOC’Y, HARV. U. (Sept. 20, 2012), <http://www.dmlp.org/blog/2012/camera-records-boca-part-one>; Tony Romm, *Mitt Romney ‘47 Percent’ Recording May Have Been Illegal*, POLITICO PRO (Sept. 18, 2012, 2:23 PM), <http://www.politico.com/news/stories/0912/81346.html>.

<sup>8</sup> Hermes, *supra* note 7; Romm, *supra* note 7. See also FLA. STAT. § 934.03 (2014).

<sup>9</sup> 18 U.S.C. §§ 2510(2), 2511 (2014) (proscribing the interception of wire, oral, or electronic communication, or disclosing the contents of such communication with at least a reason to know that the information was intercepted in violation of the statute, and defining oral communication as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation”); FLA. STAT. §§ 934.02(2), 934.03 (2014) (substantially tracking the federal Wiretap Act’s proscriptive provisions and definition of “oral communication”).

<sup>10</sup> This is not a cut-and-dry assumption to make, as this Note demonstrates *infra* in Part II.

<sup>11</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (concluding that holding a newspaper liable for breach of contract under a state-law promissory estoppel theory for reneging on a promise not to publish a confidential source’s name did not violate the First Amendment). The Supreme Court has, at times, had harsh words for news outlets accused of violating generally applicable laws: “The dissenting opinion suggests that the press should not be subject to any law . . . which in any fashion or to any degree limits or restricts the press’ right to report truthful information. The First Amendment does not grant the press such limitless protection.” *Id.* at 671. Good reasons exist to conclude, however, that courts would consider bans on certain recordings to have more than incidental effects on newsgathering, therefore falling outside the scope of *Cohen*. See Part III.C.2.

government from limiting the stock of information from which members of the public may draw.”<sup>12</sup>

The issue is much larger than Mr. Romney’s gaffe. It is the titanic struggle between “the right to know”<sup>13</sup> and “the right to be left alone.”<sup>14</sup> Ergo, the battle is between the press’s right to gather and report information of public concern (i.e. newsworthy information) and the rights of individuals in the public eye to maintain privacy in their communications. Where the information pertains to a matter of public concern uttered by a “public speaker,”<sup>15</sup> a civilized society ruled by the will of the people demands that the law err on the side of disclosure and transparency.

A general understanding in today’s society presupposes that the press is not limited to traditional news media outlets like newspapers or radio stations but encompasses citizen journalists who gather and distribute news.<sup>16</sup> In the highly connected world in which we live, it takes only a matter of seconds for a person to record and disseminate oral communications. Scenarios quickly come to mind where

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<sup>12</sup> First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

<sup>13</sup> Supreme Court Justice William Douglas styled a “right to know” argument by reasoning that “imbedded in the First Amendment is the philosophy that the people have the right to know.” *Hamling v. United States*, 418 U.S. 87, 141 (1974) (Douglas, J., dissenting); *see also* *Pell v. Procunier*, 417 U.S. 817, 841 (1974) (Douglas, J., dissenting) (“[A]n absolute ban on press interviews with specifically designated federal inmates is . . . an unconstitutional infringement on the public’s right to know.”). Justice Douglas has not cornered the market on the phrase, however. Justice Harry Blackmun has also used it. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring) (concurring in the Court’s holding that the First Amendment requires criminal trials to be open to the public by arguing that the public has “an intense need and a deserved right to know” about the process surrounding criminal trials).

<sup>14</sup> *Roe v. Wade*, 410 U.S. 113, 167 n.2 (1973) (Stewart, J., concurring) (recognizing that a general right to privacy, the “right to be let alone by other people,” is left to state law); *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (stating that the right to be left alone is “the most comprehensive of rights and the right most valued by civilized men.” (internal citation omitted)).

<sup>15</sup> The term “public speaker” is used here to describe public officials, candidates for public office, and private persons who communicate about matters of public concern. Federal and state high courts have recognized that candidates for public office and private persons who are involved in public affairs have a diminished expectation of privacy similar to that of public officials. *See infra* Part III.B.1.

<sup>16</sup> *See* Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515, 591 (2007) (arguing that “all those who disseminate information to the public” should be treated as journalists); *see also infra* note 140.

capturing information of vital public importance would be as easy as pressing the “record” button on a smartphone. Take, for example, a taxi cab driver who might record a conversation between two public officials and deliver the recording to a newspaper, or, as an entrepreneurial journalist herself, upload the recording to her blog. Or consider a custodian who could eavesdrop on one end of a telephone conversation between a union leader and management while emptying wastebaskets in the room. Imagine that a restaurant waiter to a private booth occupied by corporate officials overhears a conversation about the relocation of a factory that would send the community into an economic tailspin. The possibilities are endless.<sup>17</sup>

Scenarios such as these have already presented themselves in litigation over related issues concerning the Wiretap Act and the First Amendment. For example, several high-profile cases have involved citizen recordings of one specific type of public figure—police officers.<sup>18</sup> Other notable cases in appellate courts have involved the recording of public speaker communications, although these cases have not decided the specific issue presented in this Note.<sup>19</sup> These scenarios will only become more prevalent as smartphones and other handheld devices capable of capturing audio and video become more readily available and widely used.

The benefits of permitting the interception of communications in such scenarios are twofold. First, the publication of such recordings would give the public information needed to make decisions about whom to vote for, where to shop, where to work, where to send their children to school, which products to buy or not buy, and so forth.<sup>20</sup> Second, it would reduce the potential for collusive corruption in

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<sup>17</sup> This non-exclusive set of hypothetical situations is referred to *infra* as the “just-press-record scenarios.” These fact patterns are used throughout this Note to illustrate the contours of the current rules and the application of proposed solutions to various circumstances.

<sup>18</sup> See *infra* notes 193–202 and accompanying text; see also *Section 1983 Claims and the Right to Record the Police*, THE NEWSROOM LAW BLOG (May 2, 2011), <http://www.newsroomlawblog.com/articles/wiretapping-1>.

<sup>19</sup> See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 518–19 (2001) (involving a cell phone conversation about teachers’ union negotiations that was intercepted by an unknown person and provided to a radio station); *Boehner v. McDermott*, 441 F.3d 1010, 1012 (D.C. Cir. 2006) (involving a conference call between Representative John Boehner and then-House Speaker Newt Gingrich recorded by private citizens using a police scanner). See *infra* notes 131–134 and accompanying text for further discussion of these cases.

<sup>20</sup> See *infra* Part IV.A.

society's centers of power by putting public speakers on notice that their communications could be recorded at any time. This would increase transparency and reduce back-room deals entered into without the public's knowledge but which have a detrimental effect on the people.<sup>21</sup>

Thus far, scholarship on the legality of these recordings has focused on the speaker.<sup>22</sup> This Note provides a different perspective focused properly on those who stand to benefit from the information surreptitiously recorded: the general public. Part II examines the Wiretap Act, considering its soundness and infirmities as applied to the surreptitious recording and dissemination of information that, like Mr. Romney's "47 percent" gaffe, raises a public concern. Part III examines the First Amendment principles involved in the surreptitious recording of public officials and private persons communicating about matters of public concern (collectively "public speakers"). While it would be ideal for courts to recognize a right to receive information of public concern that trumps the diminished privacy interests of public speakers, Part IV proposes that Congress should update the Wiretap Act to reflect this constitutional principle with an exception that would permit a person to press "record" when that person (1) is lawfully on the premises where the recording takes place, is not committing a crime, and is not otherwise violating a relationship of trust and confidence; (2) reasonably recognizes, at the time of the interception, that the communication pertains to a matter of legitimate public concern; (3) distributes the information for the public's benefit; and (4) does not seek to use the communication in an act of bribery or extortion.

## II. EXAMINING THE FEDERAL WIRETAP ACT

Exactly how the Wiretap Act,<sup>23</sup> which governs the interception or recording of oral communications, would be applied in the just-press-record scenarios proposed herein is less than clear. The statute has

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<sup>21</sup> See *infra* Part IV.B.

<sup>22</sup> See Meredith Regan, Note, *All the World Wide Web is a Stage: Free Speech, Expressive Association, and the Right to Choose Your Audience*, 53 B.C. L. Rev. 1119, 1121, 1152 (2012) (arguing that a First Amendment inquiry for the distribution of surreptitious recordings should focus on the speaker's association interests and that the Supreme Court's public concern test should be abandoned).

<sup>23</sup> 18 U.S.C. § 2510 *et seq.* (2012) (as amended by the Electronic Communications Privacy Act of 1986 ("ECPA")).

been criticized for failing to keep pace with advancements in modern audiovisual technology<sup>24</sup> and its definition of oral communications—the category of communications at issue in just-press-record scenarios—is susceptible to variant judicial interpretations, making a recorder’s liability under the Wiretap Act dependent on the jurisdiction.<sup>25</sup> Moreover, the statute contains several exceptions,<sup>26</sup> the most notable of which requires a court to determine whether a party to the communication consented to the interception and if the interceptor possessed a criminal or tortious purpose.<sup>27</sup> As discussed below, the potential for inconsistent liability illustrates the interpretive holes left by Congress and endangers the public’s right to receive information of legitimate public concern.<sup>28</sup>

### A. *History and Statutory Language*

The Wiretap Act makes it unlawful to intercept wire, oral, or electronic communications, or to disclose the contents of such communications if the interceptor knows or has reason to know the communication was intercepted in violation of the statute.<sup>29</sup> The Act

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<sup>24</sup> See *infra* notes 35–40 and accompanying text.

<sup>25</sup> See *infra* Part II.B.

<sup>26</sup> See 18 U.S.C. § 2511(2)(a)–(i).

<sup>27</sup> 18 U.S.C. § 2511(2)(d).

<sup>28</sup> See *infra* Part IV.A.

<sup>29</sup> 18 U.S.C. § 2511(1) (2014), the proscriptive provision of the Wiretap Act, provides in pertinent part that:

[A]ny person who (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; . . .  
**(c)** intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; **(d)** intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

defines “intercept” as the “aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”<sup>30</sup> The Act defines “oral communication” as that which is “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such an expectation.”<sup>31</sup>

The federal wiretap statute was first enacted in 1968 as Title III of the Omnibus Crime Control and Safe Streets Act.<sup>32</sup> When it was first passed, the Senate Committee on the Judiciary determined that the statute’s main purpose was to fight organized crime.<sup>33</sup> It accomplished this by “protecting the privacy of wire and oral communications” and establishing the conditions that must be met for the interception of such communications to be authorized.<sup>34</sup>

The Wiretap Act is an outdated statute regarding current advancements in technology.<sup>35</sup> Reflecting the Senate Committee on the Judiciary’s belief that the statute was “hopelessly out of date,”<sup>36</sup> Congress amended the Wiretap Act in 1986 to add “electronic communication”<sup>37</sup> to oral and wire communications.<sup>38</sup> Provisions

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<sup>30</sup> 18 U.S.C. § 2510(4) (2014).

<sup>31</sup> 18 U.S.C. § 2510(2) (2014).

<sup>32</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211 (1968); see also Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 391 (2012).

<sup>33</sup> S. Rep. No. 90-1097, at 2157 (1968) (“The major purpose of [the federal wiretap law] is to combat organized crime.”).

<sup>34</sup> S. Rep. No. 90-1097, at 2153; see also *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

<sup>35</sup> See Triano, *supra* note 32, at 407.

<sup>36</sup> S. Rep. No. 99-541, at 3556 (“[T]he existing law is ‘hopelessly out of date.’ . . . It has not kept pace with the development of communications and computer technology. Nor has it kept pace with changes in the structure of the telecommunications industry.”). The Committee Report identified e-mail, cell phones, pagers, data sharing, and video teleconferencing as communication mediums that were not then accounted for by the statute. *Id.*

<sup>37</sup> This amendment was known as the Electronic Communications Privacy Act of 1986. In addition to the ECPA, Congress added other electronic privacy provisions to the criminal code, including the Stored Communications Act. See 18 U.S.C. § 2701 *et seq.* The Wiretap Act now defines “electronic communication” as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate



directly addressing video and other communications that depict images are still conspicuously absent, however, despite several amendments to the Act since 1986.<sup>39</sup> This fact is perplexing given that most people have access to handheld video recording devices and video surveillance is arguably more intrusive than the interception of oral, wire, or electronic communications.<sup>40</sup>

Because an iPhone, video camera, or other handheld recording device would qualify as a device capable of acquiring the contents of an oral communication, liability under the Wiretap Act in just-press-record scenarios would hinge on a court's construction of two key provisions. One interpretive battle turns on the meaning of "oral communication." More specifically, what circumstances justify a speaker to expect that her communication will not be intercepted? Federal courts have had trouble articulating a clear view of this definition.<sup>41</sup> A second interpretive difficulty arises under the Wiretap Act's exception allowing the interception of communications with "consent" from a party to the communication unless the interceptor has a criminal or tortious purpose in violating the Constitution or federal law.<sup>42</sup>

The Wiretap Act's susceptibility to variant interpretations would likely chill the traditional press and potential citizen journalists from gathering the newsworthy communications of public speakers when

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or foreign commerce." 18 U.S.C. § 2510(12). This definition excludes wire or oral communications, communications through a tone-only paging device, communications from a tracking device, or "electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds." *Id.* § 2510(12)(A)–(D).

<sup>38</sup> Triano, *supra* note 32, at 407–08.

<sup>39</sup> S. Rep. No. 99-541, at 3567 (1986); Triano, *supra* note 32, at 408. The Wiretap Act was amended again in 1994, 1996, 2001, 2002, and 2008.

<sup>40</sup> *United States v. Mesa-Rincon*, 911 F.2d 1433, 1437 (10th Cir. 1990) ("We believe that the interception of oral communications provides a strong analogy to video surveillance even though video surveillance can be vastly more intrusive."); Triano, *supra* note 32, at 408 ("A video recording captures everything but an individual's inner thoughts—physical characteristics, gestures, and demeanor—far beyond the intrusion posed by an audio recording.").

<sup>41</sup> *Cf.* Nick J. Vizio, *What Constitutes a Communication?—Expectation of Privacy*, in CORPORATE COUNSEL'S GUIDE TO WHITE COLLAR CRIME § 9.5 (2012) ("[M]ost cases are not . . . clear-cut.").

<sup>42</sup> *See* 18 U.S.C. § 2511(2)(d).

uttered in circumstances less public than a press conference. Consequently, the public's right to receive information regarding matters of public concern could be infringed by public speakers attempting to hide behind wiretapping laws.<sup>43</sup>

### B. *Susceptibility to Variant Judicial Interpretations*

Federal appellate courts have established several tests for determining what constitutes an "oral communication" under the Wiretap Act that could lead to liability for the interception of oral communications in some jurisdictions but not others. For example, the Fourth Circuit's construction of the term places a person's justifiable expectation that her communications will not be intercepted on a sliding scale of suspicion.<sup>44</sup> On that theory, a person who knows for certain that her communication is being intercepted has no reasonable expectation that her communication is private, while a person who merely suspects that her communication is possibly being monitored might still be justified in expecting that her communication is private.<sup>45</sup> As the court explained, "[at] some point along the path of developing suspicion" a justified expectation of privacy becomes unjustified.<sup>46</sup> However, a justified expectation of privacy does not become unjustified at the "first glimmer of generalized suspicion that something could or might be amiss is aroused."<sup>47</sup>

The Fifth Circuit takes a different approach. In *Kee v. City of Rowlett, Texas*, that court held that persons speaking at a graveside memorial service for children who had been murdered had no expectation of privacy when police officers intercepted their communications using an electronic surveillance microphone.<sup>48</sup> After

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<sup>43</sup> See *infra* Part IV.A.

<sup>44</sup> *United States v. Duncan*, 598 F.2d 839, 849–50 (4th Cir. 1979).

<sup>45</sup> *Id.* (affirming the conviction of a bank president who ordered and assisted his employees in installing a hidden radio transmitter to monitor the conversations of IRS agents auditing the bank).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 208 (5th Cir. 2001). The communications were those of the children's father and grandmother. *Id.* The children's mother was charged and convicted of murdering them, *id.*, which explains the relevance of the communications and surveillance at the graveside service. The police officers obtained

concluding that a speaker must demonstrate an “actual expectation of privacy” in her communications for the interception to be actionable,<sup>49</sup> the court articulated six factors to consider when determining whether a speaker has such a subjective expectation of privacy:

1. [T]he volume of the communication or conversation;
2. [T]he proximity or potential of other individuals to overhear the conversation;
3. [T]he potential for [the] communications to be reported;
4. [T]he affirmative actions taken by the speakers to shield their privacy;
5. [T]he need for technological enhancements to hear the communications; and
6. [T]he place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.<sup>50</sup>

Applying this six-factor test to Mr. Romney’s gaffe leaves a less-than-clear picture about whether the person who set up the video camera would face liability for the interception of an oral communication under the Wiretap Act. The speech was loud enough for donors attending the dinner to hear, presumably aided by the

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permission from the cemetery to enter and conduct surveillance but did not obtain a warrant or consent from the family to do so. *Id.*

<sup>49</sup> The court applied a Fourth Amendment analysis, reasoning that government searches and the Wiretap Act implicate the same interests. *Kee*, 247 F.3d at 211. This analysis involved two questions: (1) whether the plaintiffs had demonstrated an “actual expectation of privacy” and (2) “whether the individual’s expectation of privacy is one that society is prepared to recognize as reasonable.” *Id.* at 212. The court decided the case on the first question but did not reach the second. *Id.* at 217. The court determined that the plaintiffs had not demonstrated that they had a subjective expectation of privacy in their communications because there were third parties and members of the media in close proximity to the communications and the plaintiffs took no steps to preserve the privacy of their communications. *Id.* at 216–17.

<sup>50</sup> *Kee*, 247 F.3d at 213–15 (internal citations omitted) (acknowledging non-exclusivity of these factors).

amplification of a public address system, and thus no technological enhancement like an electronic listening device was needed for the communication to be heard.<sup>51</sup> Mr. Romney's remarks were addressed to the donors, but others, including caterers and waiters, were present and would have been able to hear his speech.<sup>52</sup> Further, the remarks had the potential to be—and ultimately were—reported to the public.<sup>53</sup> These factors suggest that Mr. Romney may not have had a subjective expectation that his communications would remain private.

Unlike the memorial service that took place outdoors in the presence of news media in *Kee*, however, Mr. Romney's gaffe was uttered at a private campaign fundraising event from which reporters had been deliberately excluded; Mr. Romney himself told reporters they could not accompany him to the dinner.<sup>54</sup> It is questionable how much Mr. Romney tried to preserve the privacy of his communications. After all, the video camera that recorded his speech sat on a service table and ran without detection for more than forty-nine minutes.<sup>55</sup>

While the *Kee* factors seem to point to the conclusion that Mr. Romney had no subjective expectation of privacy in his speech, application of the *Duncan* sliding scale analysis makes this conclusion less clear. After all, Mr. Romney presumably did not know that his speech was being recorded and likely did not even suspect as much. This demonstrates how susceptible the Wiretap Act's definition of oral communications is to variant interpretations. A person would likely be liable under the Wiretap Act for recording Mr. Romney's speech in some jurisdictions but not others.

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<sup>51</sup> In *Kee*, the court alluded that only technological enhancements of the sense of hearing are relevant to this inquiry. *Kee*, 247 F.3d at 217. Indeed, the court considered this to be the strongest factor in favor of the plaintiffs' ability to demonstrate a subjective expectation of privacy. *Id.* This makes sense since a person speaking into a microphone would know that his voice is being amplified. His subjective expectation of privacy would thus be diminished. On the other hand, he would not know, for example, that a person in a van in the parking lot was listening to his speech using an ultrasonic receiver.

<sup>52</sup> See Ross, *supra* note 1.

<sup>53</sup> See *supra* notes 7 and 8 and accompanying text.

<sup>54</sup> Ross, *supra* note 1.

<sup>55</sup> *Id.*

Applying the *Kee* factors or *Duncan* test<sup>56</sup> to other just-press-record scenarios would produce results that are even less consistent. For example, a technological enhancement would not be needed for a taxi cab driver to overhear the conversation of two public officials sitting in her back seat even though the volume of the communication would be less than a speech to a room full of donors. Only the cab driver would be in close enough proximity to overhear the conversation, but the potential would still exist for the conversation to be reported to the public. Likewise, the public officials would not know with certainty that their conversation was being recorded. Even if they suspected as much, they would not likely have a high level of suspicion. Thus, the susceptibility of the Wiretap Act's definition of oral communication presents the opportunity for a public speaker to cry foul when a slip of his tongue is recorded and published. This could chill reporters and citizen journalists from gathering this information. The public's right to receive information of public concern should not depend on the jurisdiction they are in.<sup>57</sup>

### C. *Exceptions to the Statutory Language*

The Wiretap Act contains several exceptions.<sup>58</sup> Most relevant to the oral communications at issue in just-press-record scenarios, the Act does not proscribe interceptions by parties to the communication or persons with consent from one party to the communication if the interception is not committed with a criminal or tortious purpose.<sup>59</sup>

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<sup>56</sup> Use of these approaches is not meant to suggest that *Kee* and *Duncan* are the only tests used by the federal courts, but merely to illustrate variance among the circuits and the inadequacy of the Wiretap Act as it is currently drafted to protect the right of the public to receive information of public concern.

<sup>57</sup> See *infra* Part IV.A.

<sup>58</sup> See 18 U.S.C. § 2511(2)(a)–(i). These provisions except from liability (1) interceptions conducted by employees of providers of wire or electronic communication services while in the normal course of their employment or pursuant to a court order, 18 U.S.C. § 2511(2)(a)(i)–(ii); (2) interceptions conducted by law enforcement pursuant to consent or as part of a lawful investigation, 18 U.S.C. § 2511(2)(c), (i); and (3) interceptions conducted by government officials in gathering foreign intelligence, 18 U.S.C. § 2511(2)(e)–(f)—only to name a few. See 18 U.S.C. § 2511(2) for a list of all Wiretap Act exceptions.

<sup>59</sup> 18 U.S.C. § 2511(2)(d) (providing that a person “not acting under color of law” will not be liable under the Wiretap Act for the interception of a wire, oral, or electronic communication when that person is a party to the communication or a party to the communication has consented to the interception “unless such communication is

Commentators have asked whether the person who recorded Mr. Romney's "47 percent" speech was a party to the communication or implicitly gave consent to the interception.<sup>60</sup> However, at least one federal court has read consent narrowly to exclude "knowledge of the *capability* of monitoring."<sup>61</sup>

This debate illustrates the interpretive holes left by the Wiretap Act's language and its inadequacy in addressing modern technological advancements. Moreover, the inclusion of nine exceptions (not counting subsections) demonstrates Congress's intent that the proscriptive provisions of the Wiretap Act should not operate as a hard rule of liability in all circumstances. While the canon of *expressio unius est exclusio alterius*<sup>62</sup> would weigh against judicial interpretations that would find a statutory exception for the interception of oral communications in just-press-record scenarios, Congress is not constrained from enacting such an exception. If Congress has been willing to include nine exceptions to the statute thus far, there is no reason to think that it could not pass another exception to the statutory prohibitions.

Simply put, the Wiretap Act fails to draw an acceptable line between the diminished—but at times admittedly legitimate—privacy expectations of public speakers and the First Amendment right of the public to receive information of public importance.<sup>63</sup> The statute's

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intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State").

<sup>60</sup> Hermes, *supra* note 7. If the person who recorded the speech was an invited donor, then he or she would likely be considered a party to the communication. *Id.* If that person was part of the catering staff, then Mr. Romney could argue that he or she was not an intended recipient, was not a party to the communication, and did not have consent to record from a party to the communication. *Id.*

<sup>61</sup> Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983) (emphasis in original) (reasoning that consent under the Wiretap Act cannot be "cavalierly implied" and that it would "thwart" Congress's "strong purpose to protect individual privacy" if consent could easily be implied from the circumstances).

<sup>62</sup> See United States v. Wells Fargo Bank, 485 U.S. 351, 357 (1988) (translating this canon as "the expression of one is the exclusion of others"). According to this long-used canon of statutory construction, Congress's enumeration of certain words, provisions, or exceptions in a statute suggests that Congress did not intend to include other words, provisions, or exceptions that it did not choose to express. WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 854 (4th ed. 2007).

<sup>63</sup> See *infra* Part IV.A.

less-than-clear definition of “oral communication” and its statutory exceptions create the potential for public speakers to attempt to hide behind this ambiguity. Courts might also interpret the current provisions in a way that unconstitutionally infringes the public’s right to receive information about their governing officials and other matters critical to fulfilling their roles as voters, consumers, parents, employees, and the like. Congress should eliminate this incongruity by amending the Wiretap Act to include an exception for recordings of oral communications by public speakers in just-press-record scenarios.<sup>64</sup>

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<sup>64</sup> While this Note directly addresses only the federal wiretap statute, state legislatures should follow suit and amend their wiretap laws to include an exception similar to the one proposed herein. If the Wiretap Act produces interpretive difficulties, then current state laws result in a veritable quagmire for the courts regarding the surreptitious recording of oral communication by public speakers. That at least forty-nine of the fifty states have wiretap statutes is perhaps the single consistency regarding restriction of electronic surveillance at the state level. See *Electronic Surveillance Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/telecom/electronic-surveillance-laws.aspx> (last updated Mar. 23, 2012) [hereinafter *Electronic Surveillance Laws*]. The District of Columbia, Puerto Rico, and the Virgin Islands also have their own wiretap statutes. *Id.* The lone holdout is Vermont, although that state’s supreme court has held that the recording or monitoring of a communication in a person’s home is a violation of privacy laws. *Id.*

Forty states and territories have statutes that, like the Wiretap Act, are one-party consent statutes, meaning that interceptions of communications will not result in liability when at least one party to the communication consents to the interception, even if that person is the interceptor. *Id.* Ohio has a one-party consent statute that substantially tracks the Wiretap Act regarding the provisions at issue herein. See OHIO REV. CODE ANN. § 2933.52 (West 2014); see also *Electronic Surveillance Laws*, *supra*. Twelve states and territories have all-party consent statutes, meaning that every party to the communication must consent for the exception to apply and for the interceptor to avoid liability. *Electronic Surveillance Laws*, *supra*. These all-party consent statutes are more restrictive. Illinois, an all-party consent state, has the most restrictive wiretap statute, proscribing the use of an “eavesdropping device” to hear or record “all or any part of a conversation.” 720 ILL. COMP. STAT. 5/14-2(a)(1) (2014) (stating that a person violates the statute when he “[k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . . unless he does so (A) with the consent of all of the parties to such conversation or electronic communication.”); Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, the Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 287 (2011). The Supreme Court of Illinois, however, recently held that this statute is unconstitutionally overbroad. *People v. Melongo*, No. 114852, 2014 IL 114852, ¶ 31 (Ill. Mar. 20, 2014). Florida, where the video recording of Mr. Romney’s “47 percent” speech took place, is an all-party consent state. See FLA. STAT. § 934.03(2) (d) (2014) (“It is lawful . . . for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.”).

### III. APPLYING THE FIRST AMENDMENT TO JUST-PRESS-RECORD SCENARIOS

The Wiretap Act is aimed at protecting the privacy of communications. While tension exists between the rights of privacy and a free press, the two are not mutually exclusive.<sup>65</sup> Both are “plainly rooted in the traditions and significant concerns of our society.”<sup>66</sup> The freedom of the press is expressly grounded in the First Amendment,<sup>67</sup> while the right to privacy is not explicitly mentioned in

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Unlike the Wiretap Act, forty-four state statutes include some proscription for interceptions of video or photo communications. *Electronic Surveillance Laws, supra*. Some statutes expressly prohibit such interceptions only in certain circumstances. For example, Alaska and Missouri forbid the interception of video or photo communications when nudity is involved. *Id.* Similarly, the South Carolina Code of Laws includes a “peeping tom” provision in a separate section than its wiretap statute that proscribes, among other conduct, using audiovisual equipment to invade the privacy of others. S.C. CODE ANN. § 16-17-470(A) (2013); *see also Electronic Surveillance Laws, supra*. Interestingly, this statute does not apply to “any bona fide news gathering activities,” making it less of an obstacle to the recording of oral communications by public speakers. S.C. CODE ANN. § 16-17-470(E)(5). Courts in Massachusetts have determined that the state’s statute applies when a person secretly records video if audio is also captured. *Massachusetts Recording Law*, DIGITAL MEDIA L. PROJECT, BERKMAN CTR. FOR INTERNET & SOC’Y, HARV. U., <http://www.dmlp.org/legal-guide/massachusetts-recording-law> (last updated July 31, 2012); *see also* MASS. GEN. LAWS ch. 272, § 99 (2014).

Like the Wiretap Act, these state statutes are inadequate to ensure that the public will receive the information it needs to make informed choices. Given the importance of the public’s right to receive information of public importance and the diminished privacy expectation of public speakers, state legislatures should follow suit with Congress by amending their wiretap statutes to include an exception for interceptions in just-press-record scenarios.

<sup>65</sup> *See* *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002); *Briscoe v. Reader’s Digest Ass’n, Inc.*, 483 P.2d 34, 42 (Cal. 1971) (en banc) (“[T]he rights guaranteed by the First Amendment do not require total abrogation of the right to privacy.”). In *Briscoe*, the Supreme Court of California held that a man who brought an invasion of privacy claim against a magazine for publishing “truthful but embarrassing” facts about his prior criminal activity had stated a cause of action, concluding that to succeed the plaintiff must prove that “the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive.” 483 P.2d at 36, 44. The Supreme Court of California overruled *Briscoe*’s specific application of the First Amendment and the invasion of privacy tort in *Gates v. Discovery Commc’ns, Inc.*, 101 P.3d 552, 555 (Cal. 2004). However, nothing in *Gates* indicates that the broad proposition quoted herein was questioned.

<sup>66</sup> *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

<sup>67</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of



the Constitution.<sup>68</sup> Instead, it has liberally been read into the “liberty” protection of the Due Process Clause of the Fourteenth Amendment by the Supreme Court and includes, but is not limited to, the right to privacy in raising children, sexual relations, marriage, and the cessation of medical treatment.<sup>69</sup> These constitutionally recognized privacy interests are different, however, than privacy in information or communication.

Courts are split about the existence of a constitutional right to privacy in information,<sup>70</sup> which seems the most closely connected to the Wiretap Act’s protection against the interception of oral communication where the speaker has a justifiable expectation that such communication is not subject to interception. Indeed, the D.C. Circuit has “grave doubts” about whether a constitutional right to

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the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>68</sup> Doug Linder, *The Right of Privacy*, EXPLORING CONSTITUTIONAL CONFLICTS <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html> (last visited Apr. 4, 2014) (website maintained by Doug Linder, professor of law at the University of Missouri-Kansas City Law School). See also generally *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (protecting private homosexual activity between consenting adults); *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261, 284 (1990) (cessation of medical treatment); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (family structure); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (possession of obscene material in the home); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (marital privacy). In addition, the Supreme Court has recognized that the right to privacy may serve as a conduit to free speech since “the fear of public disclosure of private conversations might well have a chilling effect on private speech.” *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

<sup>69</sup> Linder, *supra* note 68.

<sup>70</sup> See *Nat’l Aeronautics and Space Admin. v. Nelson*, 131 S. Ct. 746, 756 n.9 (2011). Some jurisdictions have used a balancing test for disclosures of certain categories of information that weighs the government interests against the person’s privacy interest, *id.* (citing *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *Woodland v. City of Hous.*, 940 F.2d 134, 138 (5th Cir. 1991); *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 110 (3d Cir. 1987); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983); *State v. Russo*, 790 A.2d 1132, 1147–50 (Conn. 2002)), while another has held that a right to privacy in information applies only to invasions of interests which are fundamental or “implicit in the concept of ordered liberty,” *id.* (citing *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). The Supreme Court declined an opportunity to squarely decide this issue in *Nelson*. 131 S. Ct. at 751 (“We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*. We hold, however, that the challenged portions of the Government’s background check do not violate this right in the present case.”).

privacy in information exists.<sup>71</sup> Another court has concluded that “the verdict on informational privacy is an unequivocal ‘who knows.’”<sup>72</sup>

While the common law of most jurisdictions had recognized a general right of privacy by the mid-1970s,<sup>73</sup> this is not a constitutionally protected interest. In *Katz v. United States*, the Supreme Court reasoned that the Constitution does not protect a general right of privacy between private persons, but that “a person’s general right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States.”<sup>74</sup> The Court’s determination that the Constitution does not protect a general privacy interest between private citizens suggests the subordinate nature of privacy protections when pitted against the First Amendment.

In contrast, the Supreme Court has said that a broad reading of the First Amendment’s protection for a free press is necessary to “assure[] the maintenance of our political system and an open society.”<sup>75</sup> Illustrating the superiority of the First Amendment, the drafters of the Restatement (Second) of Torts interpreted Supreme Court precedent to conclude that a cause of action for an invasion of privacy would not overcome the protections necessary for a free press when the subject of a published statement challenged in court is a matter of “legitimate concern to the public.”<sup>76</sup> The Restatement presumes that the broad constitutional definition of “legitimate concern to the public” preempts narrower state definitions.<sup>77</sup>

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<sup>71</sup> *Am. Fed’n of Gov’t Employees v. HUD*, 118 F.3d 786, 791 (D.C. Cir. 1997).

<sup>72</sup> *Elkins v. Elenz*, No. 8:11-cv-2817-T-23AEP, 2012 WL 2952435, at \*2 (M.D. Fla. July 19, 2012).

<sup>73</sup> See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 488–89 (1975) (discussing the prevalence of courts’ recognition of a right to privacy in U.S. jurisdictions).

<sup>74</sup> *Katz v. United States*, 389 U.S. 347, 348, 350–51 (1967) (footnote omitted) (concluding that the government violated the Fourth Amendment by installing an electronic recording device in a telephone booth and intercepting a person’s conversations).

<sup>75</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (remanding an award of damages to consider First Amendment principles for a family who obtained a verdict against Time, Inc., publisher of *Life Magazine*, for publishing what they claimed was an inaccurate depiction of an ordeal wherein they were held hostage in their home by three convicts for nineteen hours).

<sup>76</sup> RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) (internal quotation marks omitted) (citing *Cox Broad.*, 420 U.S. at 492).

<sup>77</sup> *Id.*

How broadly should the courts read the First Amendment? To evaluate the application of the First Amendment to just-press-record scenarios, one must understand constitutional protections for the tenets of a free press: newsgathering<sup>78</sup> and publication. Before delving into those topics, however, two questions must be answered. First, what, exactly, is a matter of legitimate public concern? Second, where should courts draw the line between a legitimate public concern and a public speaker's legitimate privacy interests in her communications?

### *A. Matters of Legitimate Public Concern*

The Supreme Court has reasoned that speech regarding matters of legitimate public concern is “at the heart of the First Amendment’s protection.”<sup>79</sup> To be sure, the Constitution does not limit publicly important matters to discussion of politics or public affairs.<sup>80</sup> Rather, the concept encompasses “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>81</sup> For example, the Court has reasoned that the line between information and entertainment is too “elusive” to afford proper protection to a free press,<sup>82</sup> implying that courts should err on the side of concluding that a matter pertains to a legitimate public concern rather than not.

While the Supreme Court has noted that the public-concern test is “not well defined,”<sup>83</sup> the drafters of the Restatement (Second) of Torts may have said it best when describing the scope of matters of legitimate public concern:

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<sup>78</sup> The interception of oral communications in just-press-record scenarios is an act of newsgathering.

<sup>79</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (internal quotation marks omitted) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

<sup>80</sup> *Time*, 385 U.S. at 388 (concluding that an article about a play based on actual events concerning three convicts who took a family hostage in their own home was a matter of public concern).

<sup>81</sup> *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

<sup>82</sup> *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

<sup>83</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

The scope of a matter of legitimate concern to the public is not limited to “news,” in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.<sup>84</sup>

Supreme Court jurisprudence has created two primary strands of cases in which courts have distinguished between matters of public and private concern,<sup>85</sup> but the test for what constitutes a matter of public concern overlaps both lines of cases.<sup>86</sup> One strand holds that government employers may restrict speech by public employees unless the employee is speaking as a “citizen upon matters of public concern.”<sup>87</sup> To determine whether speech pertains to a matter of public concern, the Court has instructed lower courts to take into account the entire record and consider three factors: the speech’s content, the form in which it was presented, and the context in which it was uttered.<sup>88</sup> The Supreme Court perhaps provided its most concrete definition of “public concern” in *City of San Diego, Cal. v.*

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<sup>84</sup> RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (1977). The Restatement drafters grounded this characterization of public concern in constitutional terms, citing the Supreme Court’s decision in *Cox Broadcasting, Inc. v. Cox*. *Id.* § 652D cmt. d. The drafters further clarified this characterization by stating that matters “customarily regarded as ‘news’” fall within the scope of public concern. *Id.* § 652D cmt. g. Quite unsurprisingly, such news includes reports of homicides, natural disasters, fires, rare diseases, and the like. *Id.* However, the drafters also included other examples illustrating the broad scope of public concern, e.g. marriages and divorces, a police report about the escape of a wild animal, and even a twelve-year-old girl who gave birth. *Id.* The drafters concluded that matters of legitimate public concern include “matters of genuine, even if more or less deplorable, popular appeal.” *Id.* (emphasis added).

<sup>85</sup> Eugene Volokh, Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You, 52 STAN. L. REV. 1049, 1095 (2000).

<sup>86</sup> See *infra*, notes 87–95.

<sup>87</sup> *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (holding that an assistant district attorney’s distribution of a questionnaire concerning the office’s transfer policy to colleagues was not speech about a matter of public concern and that her termination did not violate the First Amendment).

<sup>88</sup> *Id.* at 147.

*Roe*, when it stated that a matter of public concern is one that “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.”<sup>89</sup>

The other application of the public-concern test appears in defamation cases where no showing of “actual malice” has been found, holding that the First Amendment does not proscribe recovery of presumed and punitive damages in such cases when the defamatory remarks are not about “matters of public concern.”<sup>90</sup> This rule first appeared in *Dun & Bradstreet v. Greenmoss Builders*,<sup>91</sup> which adopted the content-form-context rule applied in the public employee speech cases.<sup>92</sup> In 2011, the Court completed the melding of the tests from the public employee and defamation lines of cases when it held that the First Amendment protects a speaker from state tort liability when he speaks on matters of public concern.<sup>93</sup> The Court stated that speech pertains to a public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”<sup>94</sup>

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<sup>89</sup> *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83–84 (2004) (holding that a police officer who made a video of himself performing sexually explicit acts in a police uniform had not engaged in an expression of public concern and thus he could not prevail on a claim that his termination from employment violated the First Amendment). The Court also recognized that “certain private remarks . . . touch on matters of public concern.” *Id.* at 84 (citing *Rankin v. McPherson*, 483 U.S. 378, 386 (1987)).

<sup>90</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (plurality opinion). In *Dun & Bradstreet*, the Court concluded that a contractor’s credit report was not a matter of public concern because “it was speech solely in the individual interest of the speaker and its specific business audience” and thus a credit reporting agency did not receive special protection from punitive damages in a defamation suit when it sent the report to several of its subscribers. *Id.* at 762. The Court reasoned that the agency’s dissemination of the report was “solely motivated by the desire for profit” and was “more objectively verifiable than speech deserving of greater protection.” *Id.* The Court concluded that this speech was “wholly false and clearly damaging to the victim’s business reputation.” *Id.*

<sup>91</sup> See Volokh, *supra* note 85, at 1096.

<sup>92</sup> *Dun & Bradstreet*, 472 U.S. at 761 (plurality opinion).

<sup>93</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (citing cases from both the public employee and defamation cases and holding that members of the Westboro Baptist Church could not be liable for intentional infliction of emotional distress when they picketed at military funerals with signs that contained inflammatory messages relating to the military’s position regarding homosexuality).

<sup>94</sup> *Id.* at 1216 (internal citations and quotation marks omitted).

The Court also noted that neither the content, form, nor context is dispositive; “it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”<sup>95</sup>

The public-concern test has been criticized as applied in both lines of cases, mostly because it is “so potentially broad and so vague” that its susceptibility to variant interpretations has produced inconsistent results.<sup>96</sup> One critic characterized the public-concern test as “both vague to the point of indeterminacy and extremely broad.”<sup>97</sup> The content-form-context test has been criticized as “virtually guarantee[ing] that the inquiry will be both unpredictable and little related to the phrase ‘public concern.’”<sup>98</sup> This vagueness has resulted in confusion and inconsistency in the lower courts and threatens a spillover of government restriction on speech by citizens who are not public employees.<sup>99</sup>

While a case-by-case analysis would apparently be needed to determine whether communications intercepted in just-press-record scenarios regard matters of legitimate public concern, the scenarios presented herein would easily fall within the scope of courts’ articulation of the principle. Consider the recording of Mr. Romney’s “47 percent” speech. The Supreme Court has stated in unequivocal language that because speech is a mechanism of accountability, “[t]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”<sup>100</sup> Because Mr.

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<sup>95</sup> *Id.*

<sup>96</sup> See Volokh, *supra* note 85, at 1095–98 for a description of cases that have and have not found speech to be matters of public concern.

<sup>97</sup> Volokh, *supra* note 85, at 1097; see also Stephen Allred, From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 IND. L.J. 43 (1988); Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 GEO. WASH. L. REV. 1, 7 n.40, 34, 45 (1990).

<sup>98</sup> Volokh, *supra* note 85, at 1097.

<sup>99</sup> *Cf.* Volokh, *supra* note 85, at 1097. Examples of this inconsistency include decisions by lower federal courts finding that criticism of the operations of a public university department, accusations of race discrimination, and layoffs by the FBI are not matters of public concern, while cases on similar facts in other jurisdictions have come to the opposite conclusions. *Id.* (internal citations omitted).

<sup>100</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010) (internal quotation marks omitted) (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)).

Romney's speech was made to a group of potential donors and included remarks relevant to his fitness as president, there is little, if any, question that the subject of his speech was a matter of public concern.

Moreover, the Court has explicitly considered union negotiations to be matters of public concern;<sup>101</sup> thus, the custodian's recording of a union leader's end of a telephone conversation while emptying waste baskets would involve a matter of public concern. Lastly, the Court has held that a newspaper that published the name of a rape victim could not be held liable because the story involved a matter of public concern: the commission and investigation of a violent crime.<sup>102</sup> Given this broad conclusion, a waiter's recording of a restaurant meeting between corporate and government officials about the closing of a factory that employs many of a community's residents certainly would fall within the broad scope of public concern.

But defining matters of legitimate public concern answers only half the question. The First Amendment and privacy interests, while at odds, must exist side-by-side in a society that values both.<sup>103</sup> Indeed, the Ninth Circuit has recognized that the First Amendment itself protects a person's legitimate privacy interests in some circumstances.<sup>104</sup> The Supreme Court has subjected both First Amendment and privacy interests to a balancing test in other

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<sup>101</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (concluding that months-long teachers' union negotiations concerning teacher compensation were "unquestionably a matter of public concern").

<sup>102</sup> *Florida Star v. B.J.F.*, 491 U.S. 524, 536–37 (1989); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496–97 (1975) (holding that the First Amendment prohibits a state from prescribing civil liability for a television station that broadcasts the name of a juvenile victim of a rape-murder when that name was garnered from public records). In the same vein, the Court has held that publishing the name of an alleged juvenile offender named in public records is protected. *See, e.g., Okla. Publ'g Co. v. Okla. Cnty. Dist. Court*, 430 U.S. 308, 311 (1977); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

<sup>103</sup> *See Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 42 (Cal. 1971) (en banc) ("[T]he rights guaranteed by the First Amendment do not require total abrogation of the right to privacy."), *holding overruled by Gates v. Discovery Commc'ns, Inc.*, 101 P.3d 552, 555 (Cal. 2004).

<sup>104</sup> *Dible v. City of Chandler*, 515 F.3d 918, 929 (9th Cir. 2007) (recognizing that the First Amendment "no doubt" entails a right of privacy that includes "a right to make personal decisions and a right to keep personal matters private," but denying that such a right had been violated by the termination of a police officer who ran a pornographic website featuring his wife).

contexts.<sup>105</sup> Thus, to better understand the scope of matters involving a legitimate public concern, those concerns must be compared with the privacy interests of public speakers.

*B. The Line Between Legitimate Public Concern and Legitimate Privacy Interest*

A public speaker's legitimate claim to privacy in her communications is less than the average citizen.<sup>106</sup> That does not mean, however, that public speakers have no justifiable expectation of privacy in their communications. The line between a legitimate public concern and a public speaker's legitimate privacy interest can be a tricky one to draw. For example, would a government official speaking to her assistant in a hushed tone in the halls of a government office building about a piece of controversial legislation she planned to propose have a legitimate expectation of privacy in that communication? What if the subject of the communication was about her son, who was dying of a rare disease? What if this conversation took place in the foyer of her office? Would it be private then? Before drawing this line, one must understand a public speaker's diminished expectation of privacy.

*1. Diminished Expectation of Privacy for Public Speakers*

The Supreme Court and state high courts have recognized a diminished expectation of privacy for public officials.<sup>107</sup> This

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<sup>105</sup> See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667–77 (1989) (balancing an employee's Fourth Amendment privacy interests in not submitting to a urine test against a government employer's interest in obtaining information about its employees' drug use); *Connick v. Myers*, 461 U.S. 138, 150–54 (1983) (balancing the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (same).

<sup>106</sup> See *infra* Part III.B.1.

<sup>107</sup> See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 72–73 (1964) ("[W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."); *George W. Prescott Publ'g Co. v. Register of Probate for Norfolk Cnty.*, 479 N.E.2d 658, 662 (Mass. 1985) ("[A] public official has a significantly diminished privacy interest with respect to information relevant to the conduct of his office.").



diminished expectation of privacy has been extended to candidates for public office<sup>108</sup> and even to private persons who are not government officials or candidates but who involve themselves in public affairs.<sup>109</sup> Even the Restatement (Second) of Torts chapter on invasions of privacy has acknowledged this diminished expectation.<sup>110</sup>

Although not in the context of personal privacy, the Supreme Court has treated “public officials” and “public figures” as one in the same for First Amendment purposes.<sup>111</sup> As Chief Justice Earl Warren concurred in *Curtis Publishing Co. v. Butts*, the distinction between the public and private sectors is becoming increasingly “blurred.”<sup>112</sup> Thus, Chief Justice Warren concluded that distinguishing between public officials and public figures has “no basis in law, logic, or First Amendment policy.”<sup>113</sup> The four-justice plurality in *Curtis Publishing Co.*, in which Chief Justice Warren did not join but did not disagree with on this point, provided a definition of public figure that roughly

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<sup>108</sup> *Lambert v. Belknap Cnty. Convention*, 949 A.2d 709, 718 (N.H. 2008) (“[A] candidate’s decision to apply for an elected public office places his or her qualifications for that office at issue . . . . Thus, a candidate voluntarily seeking to fill an elected public office has a diminished privacy expectation in personal information relevant to that office.”).

<sup>109</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (applying the principle that an “attendant loss of privacy” is a consequence of involvement in public affairs to teachers’ union representatives and reasoning that privacy interests “give way” to the public interest in disseminating matters of public importance). Justice Breyer, writing in concurrence, also recognized that the teachers’ union president and chief negotiator were “limited public figures” because they had “voluntarily engaged in a public controversy.” *Id.* at 539 (Breyer, J., concurring). Accordingly, “[t]hey thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs.” *Id.*

<sup>110</sup> RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977) (recognizing that the publication of information about a public figure “is not limited to the particular events that arouse the interest of the public,” and that such publicity “may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life”).

<sup>111</sup> See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154–55 (1967) (plurality opinion) (holding that to prevail on a defamation claim a public figure must prove that the challenged statement was false, substantially endangered her reputation, and the publisher engaged in “highly unreasonable conduct” that was an “extreme departure” from the investigation and reporting standards of a responsible publisher).

<sup>112</sup> *Curtis Publ’g Co.*, 388 U.S. at 163 (Warren, C.J., concurring).

<sup>113</sup> *Id.*

translates to a private citizen who involves himself in public affairs. The Court provided that public figures are persons who “command[] a substantial amount of independent public interest” at the time a statement challenged in a libel suit is published.<sup>114</sup>

A citizen may be considered a public figure based on a position of importance or by “purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.”<sup>115</sup> The communicators in just-press-record scenarios would be public figures under these definitions. Public officials in the rear seat of a taxicab and Mr. Romney, as a presidential candidate, undoubtedly would have a diminished expectation of privacy due to their positions of importance. The same would apply to a corporate officer who, like the athletic director in *Curtis Publishing Co.*, would constitute a public figure by way of his position with the corporation. Finally, a union leader would be a public figure via both her position of importance and the “thrusting” of her personality into a controversy of legitimate public concern.<sup>116</sup>

Thus, on a continuum bookended by First Amendment protections for expressions regarding matters of legitimate public concern and a person’s legitimate privacy interests in communication, the privacy interests of public speakers falls farther down the line toward First Amendment protection. Indeed, the Supreme Court has reasoned that one cannot escape the risk of exposing his private life to others to some degree in a civilized society.<sup>117</sup> The Court implied that this risk is worthwhile to protect a free press and all the benefits it entails: “The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.”<sup>118</sup> Where to draw this line for public speakers is the next inquiry.

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<sup>114</sup> *Id.* at 154 (plurality opinion).

<sup>115</sup> *Id.* at 155. The Court applied these principles to conclude that a university athletic director employed by a private corporation and a private citizen who possessed no official position of importance, but who was a political activist and had deliberately inserted himself into public affairs by commanding a rioting crowd against a group of federal marshals, were both public figures. *Id.* at 135, 140, 154.

<sup>116</sup> See *supra* note 101.

<sup>117</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). The plaintiffs in that case were a family who were taken hostage by three escaped convicts in their own home. *Id.* at 536. By holding that the First Amendment protected the publication of an article about the plaintiffs’ ordeal, *id.* at 542–43, the Court implied that this risk of exposure applies to all persons, not just those who involve themselves in public affairs.

<sup>118</sup> *Id.* at 542.

## 2. *Drawing a (Fuzzy) Line*

Drawing this line is not a question of where a public speaker's constitutional right to privacy begins. The Supreme Court in *Katz* made clear that the Constitution does not provide a right of privacy between persons.<sup>119</sup> Rather, this is a question of where First Amendment protection for gathering and distributing information regarding matters of legitimate public concern ends and the *statutory* proscription for intercepting oral communications begins.

There can be no question that public speakers maintain a legitimate privacy interest in matters of their personal lives that are unconnected to actions taken in their official capacity and that this extends to their personal communications.<sup>120</sup> Equally clear, however, is that public speakers, by placing themselves in the spotlight, surrender some of their private reputation and character to public scrutiny.<sup>121</sup> Indeed, a public official has no legitimate expectation that a personal attribute relevant to her fitness for office will not be published, even if exposure of that attribute would detrimentally

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<sup>119</sup> *Katz v. United States*, 389 U.S. 347, 348 (1967).

<sup>120</sup> *Nixon v. Adm'r of Gen. Services*, 433 U.S. 425, 457, 465 (1977). In *Nixon*, the Supreme Court took up an invasion of privacy claim brought by former President Richard Nixon that was grounded in the First, Fourth, and Fifth Amendments. *Id.* at 455. The Court considered several factors in concluding that President Nixon could not prevail on that claim where the release to him of his personal papers and effects that were commingled with forty-two million documents and 880 tape recordings was subject to a statutory screening process. *Id.* at 456. The Court addressed (1) the extent to which the screening process intruded on the privacy of President Nixon's personal communications, (2) President Nixon's status as a public figure, (3) his lack of privacy interest in a majority of the documents and recordings, (4) the public interest in preserving the documents and recordings, and (5) the impossibility of separating his personal communications from the rest of the materials. *Id.* at 465. The Court concluded that President Nixon had a legitimate privacy expectation in his commingled personal communications, but that the screening process did not violate that privacy interest. *Id.* *Nixon*, however, is only marginally relevant to just-press-record scenarios. Indeed, that case did not involve communications that were obtained in violation of a statute or a claim that publication of the materials violated President Nixon's privacy interests, but whether the carrying out of a statutory screening process before releasing personal papers and affects was an invasion of privacy. *Id.* at 456.

<sup>121</sup> *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (quoting *Coleman v. MacLennan*, 98 P. 281, 291 (Kan. 1908) ("Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office.")); see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 777 n.3 (1985) (Brennan, J., dissenting) (explaining that public figures "assume the risk of rough treatment by entering the public arena").

affect her private reputation.<sup>122</sup> In addition, this rule extends to the publication of truthful facts about the “dress, speech, habits, and the ordinary aspects of personality” of a person who, although without the status of a public official, “has achieved, or has had thrust upon him, the . . . status of ‘public figure.’”<sup>123</sup>

Once again, the drafters of the Restatement (Second) of Torts may have provided the most succinct articulation of the amorphous line between matters of legitimate public concern and a public speaker’s legitimate privacy interest in the personal details of his or her life:

The line is to be drawn when the *publicity* ceases to be the giving of information to which the *public is entitled*, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.<sup>124</sup>

Wherever this rule draws the line, it seems to indicate that Mr. Romney would not be able to succeed on a claim for an invasion of privacy for the *publication* of comments he made during his speech. After all, his comments did not pertain to matters of his personal life unconnected to his official capacity, and his statements to potential campaign donors were germane to his fitness for public office.<sup>125</sup> Indeed, nearly half the country’s population lumped into Mr. Romney’s “47 percent” group, who he claimed expect to live off

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<sup>122</sup> See *Garrison*, 379 U.S. at 77 (explaining that attributes such as “dishonesty, malfeasance, or improper motivation” are germane to an official’s fitness for public office and are subject to public scrutiny).

<sup>123</sup> *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (holding that a former child prodigy in mathematics who took steps to maintain his privacy and seclusion later in life could not prevail on state constitutional and common law claims of invasion of privacy for the publication of biographical information about him as an adult in *The New Yorker* magazine).

<sup>124</sup> RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977) (emphasis added).

<sup>125</sup> See *supra* note 121 and accompanying text.

government entitlements, may have found his comments to be dishonest and improper.<sup>126</sup> The same can be said for the other just-press-record scenarios presented herein. For example, the truthful *publication* of facts about collusion by public officials undertaken in their official capacities while sitting in the back seat of a taxi cab would not seem to invoke a legitimate privacy interest.

But this does not answer the question of whether the *interception* of communications by public speakers violates a legitimate privacy interest. The cases and Restatement cited above address only the *publication* of such communications. While some courts have used a Fourth Amendment “reasonable expectation of privacy” analysis to determine liability under the Wiretap Act,<sup>127</sup> the reasonableness of a public speaker’s general privacy interest is not the subject of the Act’s definition of oral communication. The statutory language varies slightly by defining oral communications as those “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such an expectation.”<sup>128</sup> This definition targets *newsgathering* activities such as the interception of oral communications rather than the publication of intercepted communications. As noted, this definition is susceptible to variant interpretations; Mr. Romney’s gaffe might fall under this definition in some jurisdictions but not others.<sup>129</sup>

Indeed, the Supreme Court has indicated that a “clear dichotomy” exists between an interceptor of oral communications and one who publishes that communication, if not the same person or entity.<sup>130</sup> In

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<sup>126</sup> See *supra* note 121 and accompanying text.

<sup>127</sup> See, e.g., *Kee v. City of Rowlett, Tex.*, 247 F.3d 206, 211 (5th Cir. 2001).

<sup>128</sup> 18 U.S.C. § 2510(2).

<sup>129</sup> See *supra* Part II.B (discussing tests established in multiple jurisdictions to determine the circumstances in which speech is an oral communication under the Wiretap Act). Mr. Romney’s speech is but one example of a just-press-record scenario where a public speaker would be tempted to invoke the Wiretap Act retrospectively as a sword and prospectively as a shield to chill others from recording his communications regarding matters of legitimate public concern. Despite public speakers’ diminished expectations of privacy, other just-press-record scenarios presented herein arguably involve more justifiable expectations by public speakers that his or her communications will not be intercepted than a speech to a room full of donors at a private campaign fundraising event. Thus, the Wiretap Act, a statute aimed at criminalizing the interception of oral communications, is unreliable to provide proper limitations on liability for interceptors in just-press-record scenarios and constitutional protections embodied in the First Amendment must be relied upon.

<sup>130</sup> *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 464 n.28 (2001).

its most recent decision interpreting the Wiretap Act, *Bartnicki v. Vopper*,<sup>131</sup> the Court implicitly left open the question of whether the First Amendment would ever protect the interceptions of oral communications. There, the Court held that, under the First Amendment, a newspaper or other media entity cannot be held liable for publishing communications intercepted in violation of the Wiretap Act, even if the media entity knew or had reason to know that the information was obtained in violation of the statute, as long as the media entity did not participate in the interception.<sup>132</sup> The Court assumed without deciding that the interception involved in that case—the interception of a cellular phone call between a union’s president and chief negotiator by an unknown interceptor—violated the Wiretap Act.<sup>133</sup> First Amendment protection for the interceptor, however, was not an issue before the Court.<sup>134</sup>

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<sup>131</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 539 (2001).

<sup>132</sup> *Id.* at 532.

<sup>133</sup> *Id.* at 518, 529.

<sup>134</sup> In the same term as *Bartnicki*, the Court vacated a decision of the D.C. Circuit holding that a congressman had violated the Wiretap Act when he disclosed to a newspaper the contents of a telephone conversation provided to him by private persons who intercepted that conversation in violation of the Wiretap Act, and that the congressman had no First Amendment protection for that disclosure. *McDermott v. Boehner*, 532 U.S. 1050 (2001); see also 18 U.S.C. § 2511(1)(c) (prohibiting the disclosure of communications when the person knows or has reason to know that the communication was intercepted in violation of the statute). The Court instructed the circuit court to reconsider its holding in light of *Bartnicki*. *Id.* On remand, the D.C. Circuit affirmed its original conclusion that Rep. McDermott was liable under the Wiretap Act for his disclosure of the intercepted communication. *Boehner v. McDermott*, 441 F.3d 1010, 1016–17 (D.C. Cir. 2006). The court vacated its judgment, however, and granted reconsideration en banc. On rehearing, the court affirmed its prior holding, but on the very narrow ground that the First Amendment did not protect Rep. McDermott because his position on the House Ethics Committee—and rules governing that committee—imposed a duty not to disclose the intercepted communication. *Boehner v. McDermott*, 484 F.3d 573, 580–81 (D.C. Cir. 2007) (“When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins’ illegal recording. He therefore had no First Amendment right to disclose the tape to the media.”), *cert. denied* *McDermott v. Boehner*, 552 U.S. 1072 (2007). At most, the D.C. Circuit’s en banc decision stands for the proposition that the First Amendment will not protect a person who discloses an intercepted communication if some other rule imposes a duty of nondisclosure based on a duty of trust and confidence. That is not the case in any of the just-press-record scenarios presented herein. By negative implication, the decision could also signal that courts are unwilling to affirmatively hold that the First Amendment does not protect the interceptors of oral communications in all circumstances.

Protections for newsgathering and the public's right to receive information of legitimate public concern uttered by public speakers should tip the balance away from liability for interceptions in just-press-record scenarios. Congress need not wait for the Supreme Court to explicitly so hold, nor should it. Indeed, there would be no issue for judicial resolution if Congress adopted the amendment proposed herein because the Court would be bound to follow the express language of the statute and no constitutional violation would be at issue.<sup>135</sup>

Although courts generally regard protections for newsgathering and publication as distinct, with newsgathering holding a less-revered shelf on the rack of constitutional protections, the line between the two protected activities is less than clear.<sup>136</sup> On a theoretical level, newsgathering is rightly considered a "prerequisite" to publication.<sup>137</sup> Since the purportedly more-protected activity—publishing—cannot result without the so-called less-protected activity—newsgathering—it would seem logical that protections for the latter must be at least as great as that of the former. Moreover, the practical lines between publishing and newsgathering are murky. For example, if a reporter determines that a story cannot be published for lack of accuracy, that reporter incurs a duty to either abstain from publishing or continue gathering facts until the story is fit for publication.<sup>138</sup> Nevertheless, the Court has treated protections for newsgathering as a separate inquiry. Because liability for the publication of the communications of Mr. Romney's speech and other public figures in just-press-record scenarios is not seriously at issue,<sup>139</sup> only newsgathering will be addressed in detail.

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<sup>135</sup> See *infra* Part IV.C for the language of this proposed amendment.

<sup>136</sup> Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1140, 1143 (1997).

<sup>137</sup> *Id.* at 1140.

<sup>138</sup> *Id.* at 1143–44.

<sup>139</sup> Despite the Wiretap Act's proscription against disclosing communications obtained unlawfully when the disclosing party knows or has reason to know the communication was intercepted in violation of the statute, see 18 U.S.C. § 2511(1)(c), liability for the publication of Mr. Romney's speech and communications intercepted in other just-press-record scenarios is not seriously at issue. The Supreme Court has recognized the press's right to publish information notwithstanding whether the information was obtained lawfully or unlawfully, even if the media entity knew or had reason to know the information was obtained unlawfully, as long as that media entity played no part in illegally obtaining the information. *Bartnicki v. Vopper*, 532 U.S. 514, 526–27, 532 (2001); *Smith v. Daily Mail*

### C. *Protections for Newsgathering*

Two issues arise regarding First Amendment protections for newsgathering. First, who can be afforded those newsgathering protections, or in other words, who counts as a journalist in the Constitution's eyes?<sup>140</sup> Second, what activity can be protected as

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Publ'g Co., 443 U.S. 97, 103 (1979) (holding that a statute proscribing the publication of a juvenile offender's name violated the First Amendment where newspaper had been prosecuted). In *Bartnicki*, the Court extended the *Daily Mail* rule in two important ways: (1) first, it applied the rule to a radio broadcast, not a newspaper, thereby extending the rule's application outside the traditional "press"; and (2) it held that a state cannot punish a newspaper for publishing even unlawfully obtained information that it knew or should have known to be unlawfully obtained as long as it did not contribute to the unlawful acquisition of the information. *Bartnicki*, 532 U.S. at 526–27, 532 (applying the *Daily Mail* rule to a radio show that broadcasted audio of a cell phone conversation about labor negotiations for a teachers' union intercepted by a third party and given to the radio station). The First Circuit has applied this rule to websites. See *Jean v. Mass. State Police*, 492 F.3d 24, 24 (1st Cir. 2007) (finding that facts were "materially indistinguishable" from *Bartnicki* where an activist posted video on a website while knowing or having reason to know that the recording was obtained illegally; thus, the court found that the activist would likely succeed on a First Amendment claim).

Stephanie Frazee's effect-based approach to classifications of websites as journalism is a sound rule for extending *Bartnicki* to all websites that "enhance[] freedom of individual opinions and beliefs and contribute[] to the free flow of opinion and reporting." Stephanie J. Frazee, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. 609, 625, 639 (2006) ("Regardless of the medium through which information is disseminated, or the process or intent behind its production and dissemination, if information enhances freedom of individual opinions and beliefs and contributes to the free flow of opinion and reporting, it should be protected. Thus, some bloggers will be protected, but not all will."). Thus, it seems that a website that posted video of the "47 percent" speech was on solid ground.

<sup>140</sup> Anyone with access to a recording device such as a smartphone should be deemed a journalist. This idea has gained traction as traditional news entities have cut staff and relied more on "citizen journalists." Papandrea, *supra* note 16, at 521–32. Papandrea argues that "all those who disseminate information to the public" should be deemed journalists. *Id.* at 591. The federal appellate courts are split, but most concede that "journalist" is not limited to reporters at formal news entities. Several circuits have held that citizen reporters can be the "press," but to be a "journalist," one must have the intent to distribute the information prior to making a recording. See, e.g., *Kies*, *supra* note 64, at 293 (citing *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714–15 (1st Cir. 1998); *In re Madden*, 151 F.3d 125, 129–30 (3d Cir. 1998) (adding the requirement that the person must be gathering news or doing investigative journalism); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993); *von Bulow v. von Bulow*, 811 F.2d 136, 142–45 (2d Cir. 1987)). Other circuits have held that a person should be regarded as a journalist if the information being gathered is valuable to the public. See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("The First Amendment right to gather news is . . . not one that inures solely to the benefit



newsgathering? Newsgathering's status as activity, not speech,<sup>141</sup> begs an interesting question. If newsgathering is activity, not speech, and sits on a lower rung of constitutional protection than other protected activity under the First Amendment, but is a prerequisite to one of these higher protected activities, namely publication, then how is a court to ensure that a citizen is able to carry out the higher-protected activity? Put another way, would limiting the scope of protection for newsgathering unconstitutionally restrict citizens from fully carrying out their so-called higher First Amendment rights of publication?<sup>142</sup> This is a question that has been only moderately answered and with less than ideal clarity.<sup>143</sup>

### 1. *General Newsgathering Principles Under the First Amendment*

To be sure, newsgathering has *some* protection under the First Amendment.<sup>144</sup> The Court has styled this as a “right of access” or a

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of the news media; rather, the public's right of access to information is coextensive with that of the press.”); Kies, *supra* note 64, at 293 (citing *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (reasoning that “a right to record matters of public interest” is encompassed under the First Amendment); *Iacobucci v. Boulter*, 193 F.3d 14, 24–25 (1st Cir. 1999) (recognizing an independent journalist's constitutional right to videotape a public meeting)). Considering the current practice in the news industry and the availability of tools used in newsgathering to the public, the sounder reasoning would afford a wide protection for persons who may be considered journalists beyond the traditional press commensurate with Papandrea's conclusion.

<sup>141</sup> Easton, *supra* note 136, at 1141. *But see* *ACLU v. Alvarez*, 679 F.3d 583, 602–03 (7th Cir. 2012) (categorizing an audiovisual recorder as a vehicle of expression and concluding that the Illinois wiretap statute “is directly leveled against the expressive element of an expressive activity”).

<sup>142</sup> The Supreme Court itself has pointed out this anomaly: “The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576–77 (1980) (holding that the First Amendment protects the right of the press to attend trials).

<sup>143</sup> Easton, *supra* note 136, at 1141.

<sup>144</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (“Nor is it suggested that news gathering [sic] does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”); *id.* at 728 n.4 (Stewart, J., dissenting) (quoting *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965), for the implication that newsgathering receives some protection: “[T]he right to speak and publish does not carry with it the *unrestrained* right to gather information.” (emphasis added)).

“right to gather information.”<sup>145</sup> But even in *Richmond Newspapers, Inc. v. Virginia*, a “watershed case” in which the Court for the first time directly held that the activity of gathering newsworthy information is protected by the Constitution,<sup>146</sup> this right of access went only as far as protecting the same access for journalists as that of regular citizens.<sup>147</sup> Moreover, while reasoning that journalists “remain free to seek news from any source by means within the law,” the Court in *Branzburg v. Hayes* listed other limitations on the right to gather news.<sup>148</sup> A journalist may not “invade the rights and liberties of others” when carrying out his newsgathering function.<sup>149</sup> Journalists may be shut out from certain meetings of government and private bodies, such as grand jury proceedings, Supreme Court conferences, and meetings conducted in executive session.<sup>150</sup> Presumably this would extend to exclusions from attendance at campaign fundraising events on private property. Likewise, reporters may be forced to remain behind police lines at the scene of a crime or other disaster, just like regular citizens.<sup>151</sup>

One of the Court’s most restrictive opinions on the right to gather news came down in *Zemel v. Rusk*.<sup>152</sup> In *Zemel*, a U.S. citizen applied for a passport to travel to Cuba—which at that time was cut off from diplomatic relations with the United States—on the ground that he was curious about the “state of affairs in Cuba” and sought to be a

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<sup>145</sup> See *Richmond Newspapers*, 448 U.S. at 576 (citing cases).

<sup>146</sup> *Richmond Newspapers*, 448 U.S. at 583 (Stevens, J., concurring) (“Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.”).

<sup>147</sup> *Id.* at 577–80. Justice Brennan concurred, but wrote that the press may have a greater right of access in order to serve its role as an agent of the general public. *Id.* at 586 n.2 (Brennan, J., concurring) (“As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the ‘agent’ of interested citizens, and funnels information about trials to a large number of individuals.”).

<sup>148</sup> See *Branzburg*, 408 U.S. at 682–85.

<sup>149</sup> *Id.* at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937)).

<sup>150</sup> *Id.* at 684.

<sup>151</sup> *Id.* at 684–85.

<sup>152</sup> *Zemel v. Rusk*, 381 U.S. 1 (1965).

“better informed citizen.”<sup>153</sup> The Court agreed that the Secretary of State’s refusal to validate the citizen’s passport for travel to Cuba cut back on the “free flow of information.”<sup>154</sup> But despite the argument that *Zemel* was not a true newsgathering case,<sup>155</sup> the Court’s opinion contained sweeping language that seemed to be directed at newsgathering activities. The Court reasoned that the Secretary’s refusal to validate Zemel’s passport was an “inhibition of action,” not speech, and that “[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”<sup>156</sup> The Court concluded that the First Amendment rights of speech and publication do not include the “unrestrained right to gather information.”<sup>157</sup> This conclusion seems unwarranted since Zemel did not purport to be a journalist and freely admitted that he sought to gather the information for purely personal reasons.<sup>158</sup>

But *Zemel* did not carve back on the First Amendment protections for newsgathering as much as the Court’s later decision in *Cohen v. Cowles Media Co.*<sup>159</sup> In an opinion characterized by one commentator as “maledicta,”<sup>160</sup> the Court held that the First Amendment does not prevent the application of generally applicable laws to the press when those laws have only incidental effects on newsgathering.<sup>161</sup> The case

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<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Id.* at 16.

<sup>155</sup> Easton, *supra* note 136, at 1148. Zemel was not a reporter and the Secretary had issued a press release stating that exceptions to the passport ban would be made for journalists, among others “whose travel may be regarded as in the best interests of the United States.” *Zemel*, 381 U.S. at 3.

<sup>156</sup> *Zemel*, 381 U.S. at 16–17.

<sup>157</sup> *Id.* at 17.

<sup>158</sup> *Id.* at 3. Zemel originally applied for travel to Cuba as a tourist, then changed his reason after his first application was denied. *Id.* His second application stated that he wanted to travel to Cuba “to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen.” *Id.*

<sup>159</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

<sup>160</sup> See Easton, *supra* note 136, at 1139.

<sup>161</sup> *Cohen*, 501 U.S. at 670. In so holding, the Court concluded that finding a newspaper liable for breach of contract under a promissory estoppel theory for reneging on a promise not to publish a source’s name did not violate the First Amendment. *Id.* at 671 (rejecting the dissenting opinion’s argument that any law that would limit or restrict the press’s “right to report truthful information” violates the First Amendment).

has been criticized as derailing the natural progression of First Amendment protections for newsgathering.<sup>162</sup> Nevertheless, because *Cohen* is the current law as articulated by the Supreme Court, any argument for the protection of a particular newsgathering activity must navigate its holding by demonstrating that a restriction of the activity would have more than an incidental effect on newsgathering.<sup>163</sup>

## 2. *Not (Cohen)cidental: Applying Newsgathering Principles to Wiretapping Laws*

This is where the rubber meets the road. The Wiretap Act and its state analogues are laws of general applicability.<sup>164</sup> If the Act's restriction on the interception of oral communications has only incidental effects on newsgathering, then according to *Cohen* it is not an unconstitutional limitation on a free press under the First Amendment. The Court in *Bartnicki*, however, did not consider whether the Wiretap Act had direct or incidental effects on newsgathering. In fact, only one federal appellate court has considered the issue. While the Fifth Circuit in *Peavy v. WFAA-TV, Inc.* concluded that the Wiretap Act and Texas wiretap statutes have only incidental effects on newsgathering,<sup>165</sup> the court's reasoning was less than convincing.

The Fifth Circuit considered claims brought by a school trustee against two parties: (1) his neighbor for using a police scanner to record conversations he conducted using his cordless telephone and

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<sup>162</sup> Easton, *supra* note 136, at 1138.

<sup>163</sup> An earlier decision of the Court also reasoned that reporters could not violate "valid criminal laws" in the name of newsgathering. *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972). In that case, the Court explicitly listed "private wiretapping" as one criminal act not protected by the First Amendment. *Id.* This Note does not suggest, however, that Congress should amend the Wiretap Act to exempt all interceptions of private oral communications. The narrow exception proposed herein would apply only to interceptions of public speakers' oral communications in limited circumstances due to public speakers' diminished expectation of privacy. See *supra* Part III.B.1.

<sup>164</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (finding that that Wiretap Act and its Pennsylvania analog are laws of general applicability). The Pennsylvania statute in effect at that time provided that a person whose communication was "intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication." 18 PA. CONS. STAT. § 5725(a) (1988).

<sup>165</sup> *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 191 (5th Cir. 2000).

(2) a television station for reporting the contents of those conversations, which dealt with public corruption in the school system.<sup>166</sup> The court rejected the television station's argument that the Wiretap Act directly affects newsgathering because it "completely proscribe[s] use and disclosure of *all* contents of interceptions."<sup>167</sup> The court reasoned that the television station interpreted the Act too broadly because it restricts only the means by which information is acquired.<sup>168</sup> Because the defendants could have acquired the information contained in the intercepted communications from other sources, the Act's effect on newsgathering was only incidental.<sup>169</sup>

The Fifth Circuit's narrow interpretation jeopardizes the public's ability to receive information of public concern by limiting it to the chance circumstances that communications concerning backroom deals will voluntarily be made public. "Incidental" is defined as "accompanying but not a major part of something" or "occurring by chance in connection with something else."<sup>170</sup> In each just-press-record scenario, prohibiting the recording of communications involving a matter of public concern would result in more than a "chance" effect on newsgathering. Such proscription would likely prevent the information from ever being gathered and thus deprive the public of receiving information necessary to fully carry out their roles as voters, consumers, parents, employees, and the like. Indeed, it would be by "chance" only that a reporter would ever procure that information. No reporter, regardless of any intention to record, was admitted to Mr. Romney's fundraising event. The public's ability to learn about Romney's views of the "47 percent" should not have been left to the chance event that an attendee would leak details to the press. Regarding another just-press-record scenario, reporters might never learn of collusion in City Hall unless a taxi cab driver records the back-seat conversation of two public officials. To say, as *Peavy* does, that the generally applicable Wiretap Act has only incidental effects on newsgathering because a reporter might or might not be able to gain access to the information by other means leaves the

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<sup>166</sup> *Id.* at 163–67.

<sup>167</sup> *Id.* at 191 (emphasis in original).

<sup>168</sup> *Peavy*, 221 F.3d at 191.

<sup>169</sup> *Id.*

<sup>170</sup> NEW OXFORD AMERICAN DICTIONARY 878 (3d ed. 2010).

public's ability to receive critical information to chance and "eviscerate[s]" the public's First Amendment rights.<sup>171</sup>

This conclusion was reflected in 2012 when the Seventh Circuit issued its opinion in the case of *ACLU v. Alvarez*.<sup>172</sup> Although that case dealt with a state wiretap statute more restrictive than the Wiretap Act,<sup>173</sup> the action was the same: the recording of oral communications uttered by public figures.<sup>174</sup> The court concluded that regardless of whether the Illinois statute was generally applicable, "it should be clear by now that its effect on First Amendment interests is far from incidental."<sup>175</sup> Of critical importance, the court characterized the audiovisual recorder at issue as a vehicle of expression and reasoned that the statute "is directly leveled against the expressive element of an expressive activity."<sup>176</sup> Therefore, the statute directly affected the First Amendment rights of the ACLU's members.<sup>177</sup>

Moreover, *Cohen* and earlier cases limiting constitutional protections for newsgathering are distinguishable. Similar to the list

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<sup>171</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (First Amendment "guarantees are not for the benefit of the press so much as for the benefit of all of us").

<sup>172</sup> *ACLU v. Alvarez*, 679 F.3d 583, 602–03, 608 (7th Cir. 2012) (concluding that an organization with a program to record video of police activity would have a "strong likelihood" of succeeding on a First Amendment claim that the Illinois wiretap statute as applied to that program would be unconstitutional).

<sup>173</sup> The Illinois wiretap statute, 720 ILL. COMP. STAT. 5/14-1 *et seq.* (2014), prohibits the audiovisual recording of any oral communication without consent even if the communication was not intended to be private. *Alvarez*, 679 F.3d at 595. The Supreme Court of Illinois recently held that this statute is unconstitutionally overbroad. *People v. Melongo*, No. 114852, 2014 IL 114852, ¶ 31 (Ill. Mar. 20, 2014).

<sup>174</sup> The audiovisual recording of police activity was the challenged action in *Alvarez*. 679 F.3d at 586.

<sup>175</sup> *Alvarez*, 679 F.3d at 602.

<sup>176</sup> *Id.* The court elaborated that the act of recording the police activity was "antecedent" to publication, and thus the right to publish would be "insecure" or "largely ineffective" if not for the right to record. *Id.* at 595–96. The court concluded, "the eavesdropping statute operates at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication. Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Id.* at 596.

<sup>177</sup> *Alvarez*, 679 F.3d at 602.

provided in *Branzburg*,<sup>178</sup> *Cohen* itself considered only one group of generally applicable laws that had any bearing on newsgathering: trespassing, breaking and entering, and robbery.<sup>179</sup> The Court made the rather unremarkable statement that the press may not invoke the First Amendment to justify breaking into an office to gather news.<sup>180</sup> But breaking and entering and pressing record on a smartphone when a person finds herself in the right place at the right time do not have the same level of culpability. Only two other generally applicable laws cited by *Cohen* are even loosely related to journalism activities: responding to a grand jury subpoena and publishing copyrighted materials without following the relevant laws.<sup>181</sup> The other laws cited by the Court—employment laws, antitrust laws, and tax laws—dealt with a news media entity as a business and had no relation to newsgathering activities.<sup>182</sup>

Regarding the opinions holding that the press has no greater right of access than the general public, interceptors in just-press-record scenarios would presumably either be journalists or members of the general public who find themselves in the right place at the right time; no heightened right of access would be needed. Moreover, the interceptor would not necessarily “invade the rights and liberties” of the communicator, as was the concern in *Associated Press v. NLRB*,<sup>183</sup> because of the diminished expectation of privacy held by public speakers.<sup>184</sup> Lastly, *Zemel* was not a “bona fide newsgathering case.”<sup>185</sup> Because *Zemel* was not a journalist, had no interest in gathering information for public benefit, and a press release stated that journalists would likely be exempted from proscriptions against

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<sup>178</sup> See *supra* notes 148–151 and accompanying text.

<sup>179</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Cohen*, 501 U.S. at 669. The Seventh Circuit has agreed with this analysis. See *Alvarez*, 679 F.3d at 601 (reasoning that *Cohen* and *Branzburg* involved legal sanctions that were “not aimed at the exercise of speech or press rights as such”).

<sup>183</sup> See *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937).

<sup>184</sup> See *supra* Part III.B.1.

<sup>185</sup> *Easton*, *supra* note 136, at 1148.

passports into Cuba,<sup>186</sup> *Zemel* should not be understood as applicable to newsgathering at large. Therefore, these decisions limiting protections for newsgathering should not be viewed as impediments to the First Amendment protections for intercepting communications in just-press-record scenarios. The Wiretap Act and its state analogues, while generally applicable laws, are not the type of generally applicable laws contemplated by the Court in *Cohen* due to the fact that wiretapping laws directly affect newsgathering activities.

### 3. *Confirming the Distinguishability of Cohen: Recent Appellate Decisions*

A trio of relatively recent federal appellate cases suggests the soundness of concluding that *Cohen* and earlier cases limiting protections for newsgathering activities do not prevent protection for interceptors in just-press-record scenarios. In *Desnick v. American Broadcasting Co.*, the Seventh Circuit's then-Chief Judge Richard Posner did not consider *Cohen* to be problematic for a defendant television network on a claim brought under the Wiretap Act and a state wiretap law.<sup>187</sup> The case involved an appeal from a dismissal for failure to state a claim and held that a news entity would not be liable for invasion of privacy, wiretap, or other general state laws where reporters posed as customers and secretly videotaped activities inside an eye clinic using hidden cameras.<sup>188</sup> Chief Judge Posner cited *Cohen* seemingly as an afterthought and only for the narrow proposition that the press is not immune from general contract and tort liability.<sup>189</sup>

Posner's opinion regarding the electronic surveillance claims turned largely on statutory interpretation, not constitutional law, as the "testers" were parties to the recorded communications and were therefore exempt from liability under the Wiretap Act.<sup>190</sup> That exemption, however, applies only if the recording was not done with a criminal or tortious purpose.<sup>191</sup> To that end, Chief Judge Posner's

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<sup>186</sup> See *Zemel v. Rusk*, 381 U.S. 1, 3-4 (1965).

<sup>187</sup> *Desnick v. Am. Broad. Co.*, 44 F.3d 1345 (7th Cir. 1995).

<sup>188</sup> *Id.* at 1348, 1353.

<sup>189</sup> *Id.* at 1355; see also *Easton*, *supra* note 136, at 1200-04.

<sup>190</sup> *Desnick*, 44 F.3d at 1353.

<sup>191</sup> 18 U.S.C. § 2511(2)(d) (stating that a person will not be liable under the Wiretap Act if that person is a party to the communication or has consent from a party to the



reasoning resounded with underlying First Amendment principles, implying that the activity of gathering information regarding matters of public concern is not a criminal or tortious act:

[The testers' purpose] was not to injure the Desnick Eye Center, unless the public exposure of misconduct is an "injurious act" within the meaning of the Wisconsin statute. Telling the world the truth about a Medicare fraud is hardly what the framers of the statute could have had in mind in forbidding a person to record his own conversations if he was trying to commit an "injurious act."<sup>192</sup>

In similar regard, the past three years have seen the First and Seventh Circuits hold that a citizen who records police activity occurring in the open is within her First Amendment right to gather and distribute information about government officials.<sup>193</sup> Because police officers are one type of public figure, these cases support an expansion of newsgathering protections for the recording of oral communication by all public speakers.<sup>194</sup>

In *Glik v. Cunniffe*, the First Circuit held that "a citizen's right to film government officials" in a public space is "a basic, vital, and well-established liberty" under the First Amendment.<sup>195</sup> The plaintiff had been arrested and prosecuted under the Massachusetts wiretap statute for recording an arrest that he believed involved an excessive use of force at the Boston Commons.<sup>196</sup> After the criminal case was

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communication "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State").

<sup>192</sup> *Desnick*, 44 F.3d at 1353–54.

<sup>193</sup> See *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012).

<sup>194</sup> Admittedly, both cases dealt with state statutes more restrictive than the Wiretap Act: the Massachusetts and Illinois wiretap statutes. See MASS. GEN. LAWS ch. 272, § 99(B)(4) (2011) (requiring the consent of all parties to the communication before interception occurs); *Alvarez*, 679 F.3d at 595; *Glik*, 655 F.3d at 80.

<sup>195</sup> *Glik*, 655 F.3d at 85.

<sup>196</sup> *Id.* at 79–80. The criminal court dismissed all charges, noting that the fact the officers did not like being recorded did not turn "the lawful exercise of a First Amendment right" into a crime. *Id.* at 80.

dismissed, Glik filed suit under 28 U.S.C. § 1983 for a violation of his First Amendment rights, and the district court denied the government's motion to dismiss on qualified immunity.<sup>197</sup> The First Circuit affirmed, concluding that the officers had violated Glik's First Amendment rights and that those rights were clearly established at the time of the officers' conduct, implying that such a conclusion was "self-evident."<sup>198</sup>

Likewise, in *ACLU v. Alvarez*, the Seventh Circuit concluded that the ACLU had a "strong likelihood" of succeeding on the merits of its claim that the Illinois wiretap statute would violate its members' First Amendment rights to record police activity as part of a police accountability program.<sup>199</sup> The ACLU filed a pre-enforcement action seeking declaratory and injunctive relief to prevent the prosecution of ACLU members implementing the organization's program of making audiovisual recordings of police officers in action around Chicago.<sup>200</sup> The court determined the statute was content-neutral and thus applied intermediate scrutiny rather than strict scrutiny.<sup>201</sup> The statute did not pass muster. Because the police accountability program was designed to record police activity in the open, the court did not think the alleged public interest of "conversational privacy" in police communications and the tailoring between the statute's means and ends justified the infringement on the ACLU's First Amendment interests.<sup>202</sup>

Curiously, Judge Posner dissented in *Alvarez* nearly two decades after holding in *Desnick* that audiovisual recordings in a private eye

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<sup>197</sup> *Id.* at 80, 85.

<sup>198</sup> *Glik*, 655 F.3d at 84–85 (reasoning that the "terseness" of a case recognized as directly on point "implicitly speaks to fundamental and virtually self-evident nature of the First Amendment's protections in this area").

<sup>199</sup> *Alvarez*, 679 F.3d at 608.

<sup>200</sup> *Id.* at 586.

<sup>201</sup> *Id.* at 603–04. As the court explained, it is a "bedrock principle" of the First Amendment that the government may not limit expression based on its "message, its ideas, its subject matter, or its content," and that such restrictions are "presumptively invalid" and subject to strict scrutiny. *Id.* at 603 (internal citations and quotation marks omitted).

<sup>202</sup> *Alvarez*, 679 F.3d at 605–08. The court did not decide whether the recording of a private conversation would be protected by the First Amendment, but admittedly did state that if the Illinois statute had contained a provision limiting its prohibitions to recordings of such private conversations, "the link to the State's privacy justification would be much stronger." *Id.* at 607–08.

care center were not unlawful.<sup>203</sup> His opinions can be reconciled, however, by considering the constitutional avoidance undertones persistent throughout his dissent in *Alvarez*. Judge Posner reasoned that a court's action of striking down a statute on constitutional grounds should be "rare and solemn" and done with "reluctance" so that such invalidation happens only when there is clear mandatory authority, strong evidence, or "an overwhelming gut feeling, that the statute has intolerable consequences."<sup>204</sup>

Judge Posner's dissent underscores the judicial hesitation to recognize expansive First Amendment protections for newsgathering in the face of less-than-clear Supreme Court guidance. Unsure of the proper scope for this "antecedent" right,<sup>205</sup> the Court has left several large holes for lower courts to muddle through. Rather than continue to rely on lower courts reluctant to patch these holes, the public's right to receive should be recognized as a protective shield over the right to gather newsworthy information from public speakers.<sup>206</sup> Ideally, the Supreme Court would recognize the right to receive as a constitutional matter. However, this Note proposes that Congress, a political body with its own prerogative to interpret the Constitution,<sup>207</sup> should

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<sup>203</sup> *Desnick*, 44 F.3d at 1353–54. Recall that Judge Posner decided the electronic surveillance issue in *Desnick* by relying on a statutory provision that allowed the interception of an oral communication when one party consents to the interception. *Id.* at 1353.

<sup>204</sup> *Alvarez*, 679 F.3d at 609 (Posner, J., dissenting). The dissent considered the chilling effect of the court's holding on conversations between the police and private citizens, the privacy implications, the detrimental effect on the effectiveness of law enforcement, and the impracticality of police officers issuing a dispersal order anytime they wished to have a private conversation in a public space. *Id.* at 614.

<sup>205</sup> *Id.* at 595–96 (majority opinion).

<sup>206</sup> See *infra* Part IV. A full statement of this right would be a "right to receive information regarding matters of legitimate public concern uttered by public speakers." For the reader's convenience, hereinafter this right will be stated simply as the "right to receive."

<sup>207</sup> Congress has the constitutional power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all [] Powers vested by this Constitution in the Government of the United States," U.S. CONST. Art. I, § 8, cl. 18, and to "enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5. The First Amendment's freedom of the press clause was long ago incorporated as a "liberty" protection under the Fourteenth Amendment. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931). While Congress may not recognize a new constitutional right, it may enforce rights already guaranteed by any legitimate means reasonably calculated to reach a particular end. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (agreeing that Congress may pass legislation enforcing the people's First Amendment right to freely exercise their religion); *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the

recognize the public's right to receive information of legitimate public concern uttered by public speakers by amending the Wiretap Act to allow interceptions of oral communications in just-press-record scenarios.

#### IV. THE PUBLIC'S RIGHT TO RECEIVE TRUMPS THE PRIVACY INTERESTS OF PUBLIC SPEAKERS ENGAGED IN COMMUNICATION OF LEGITIMATE PUBLIC CONCERN

The Supreme Court has recognized a right to receive information as a corollary to the right of expression since the World War II era.<sup>208</sup> This right to receive, which had its genesis in *Martin v. City of Struthers*,<sup>209</sup> has evolved to make the primary right of expression more secure<sup>210</sup> and has been applied in situations too numerous to discuss in one article.<sup>211</sup> This right to receive should be viewed as interconnected with but independent from the rights of expression or publication; the rights should be regarded as independent co-equals.<sup>212</sup> As such, the right to receive should operate to elevate protections of newsgathering activities to the same level already afforded by protections for publication.<sup>213</sup> The right to receive should trump any right to privacy held by a public speaker because of the great public benefit of receiving information that will assist people in making informed choices and avoiding harm, along with the diminished expectation of privacy that comes with the territory of being in the public eye.

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end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

<sup>208</sup> See Susan Nevelow Mart, *The Right to Receive Information*, 95 L. LIBR. J. 175, 175 (2003).

<sup>209</sup> *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

<sup>210</sup> Nevelow Mart, *supra* note 208, at 175.

<sup>211</sup> *Id.* at 187.

<sup>212</sup> See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (“[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”).

<sup>213</sup> See *supra* Part III.B.2.

Ideally, courts would recognize this right to receive as protecting the right of an individual to press the “record” button when she finds herself privy to communications regarding matters of legitimate public concern. Nevertheless, there is a simpler and more straightforward solution. Recognizing the Supreme Court’s reluctance to decide constitutional questions,<sup>214</sup> Congress should amend the Wiretap Act to add an exception permitting the surreptitious recording of communications regarding matters of legitimate public concern when that person (1) is lawfully on the premises where the recording takes place, is not committing a crime, and is not otherwise violating a relationship of trust and confidence; (2) reasonably recognizes, at the time of the interception, that the communication pertains to a matter of legitimate public concern; (3) distributes the information for the public’s benefit; and (4) does not seek to use the communication in an act of bribery or extortion.<sup>215</sup> This amendment would reflect the constitutional principles of *Martin* and its progeny.

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<sup>214</sup> This hesitation, reflected in Judge Posner’s dissent in *Alvarez*, is known as the constitutional avoidance canon. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909). Because the Supreme Court under Chief Justice John Roberts has received mixed reviews concerning First Amendment protections, Congress should preempt the Court by creating an exception to the Wiretap Act. Concededly, former Solicitor General Ken Starr said the current Court is the “most free speech court in American history,” as reflected in decisions striking down statutes aimed at criminalizing video depictions of animal cruelty and protecting the picketing of military funerals. A. E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 81 (2012) (citing *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) and *Snyder v. Phelps*, 131 S. Ct. 1207, 1218–19 (2011), respectively). However, an opposing view sees these cases as “slam dunk[s]” that presumably would have been upheld by any court, and scholars as prominent as Erwin Chemerinsky take a more cynical view of the Roberts Court as pushing an ideological agenda that advocates an expansive view of the First Amendment only when applied to strike down restrictions on spending by corporations and the wealthy. *Id.* (citing Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 724, 734 (2011)). The two approaches have been reconciled by proposing that the Roberts Court has taken a view of the First Amendment different than traditionally understood by conceptualizing free speech as a right in political liberty, not political equality. *Id.* (citing Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 144, 161 (2010)).

<sup>215</sup> As a reminder, this Note directly addresses only Congress’s role in amending the Wiretap Act. State legislatures should follow suit, however, by amending their own wiretap statutes to reflect the proposed solution provided herein. See *supra* note 64 for a breakdown of state statutes.

A. *Constitutional Basis for an Exception to Liability Under Wiretap Statutes*

The public's First Amendment right to receive provides the groundwork for an amendment to the nation's wiretap statutes that would allow private citizens to intercept oral communications regarding matters of legitimate public concern and to disseminate that information to the public. In the seminal case of *Martin*, an ordinance in an Ohio city made it illegal to knock on the door of a home for the purpose of distributing literature.<sup>216</sup> A woman was convicted under that ordinance for distributing religious materials door to door.<sup>217</sup> Recognizing a right to receive information as a corollary to the right to distribute it, the Court struck down the ordinance as an unconstitutional violation of the First Amendment.<sup>218</sup> The Court weighed the right of the "individual householder to determine whether he is willing to receive her message" on the same side of the scale as the distributor.<sup>219</sup> Recognizing that trespass laws protected the homeowner from unwanted guests after their lack of consent had been

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<sup>216</sup> *Martin v. City of Struthers*, 319 U.S. 141, 142 (1943). Although *Martin* was the first case to explicitly recognize a right to receive, the Court's decision in *Grosjean v. Am. Press Co.*, decided seven years earlier, contained strong underpinnings for such a right. In that case, the Court struck down a license tax on newspapers as unconstitutional under the First and Fourteenth Amendments. *Grosjean v. Am. Press. Co.*, 297 U.S. 233, 240, 251 (1936). The Court analogized this tax to English "taxes on knowledge" levied against newspapers to suppress speech that was objectionable to England's monarchical government, which the Framers of the Constitution used as a basis for adopting the First Amendment's freedom of the press. *Id.* at 246, 248 (internal quotation marks omitted). The Court reasoned that the English taxes—and, by logical extension, the Louisiana license tax—were targeted at "prevent[ing], or curtail[ing] the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs." *Id.* at 247. Moreover, the Court stated that the taxes put at stake "an informed and enlightened public opinion." *Id.* The Court rested its analysis on the proposition that "[t]he evils to be prevented were . . . any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Id.* at 249–50 (emphasis added) (quoting 2 THOMAS MCINTYRE COOLEY & WALTER CARRINGTON, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 886 (8th ed. 1927)). See also, Christopher Witteman, *Information Freedom, a Constitutional Value for the 21st Century*, 36 HASTINGS INT'L & COMP. L. REV. 145, 203 (2013) (discussing *Grosjean*).

<sup>217</sup> *Martin v. City of Struthers*, 319 U.S. 141, 142 (1943).

<sup>218</sup> *Id.* at 149.

<sup>219</sup> *Id.* at 143.

communicated, the Court concluded that “[f]reedom to distribute information to every citizen *wherever he desires to receive it* is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.”<sup>220</sup>

Moreover, the Court has recognized the public’s right to receive information in their capacity as consumers as a justification for compelled disclosure requirements in the commercial speech context.<sup>221</sup> The Court articulated this right in *Bates v. State Bar of Arizona*:

The listener’s interest is substantial: the consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.<sup>222</sup>

The Court first recognized the public’s right to receive commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>223</sup> In that case, the Court stated that a consumer’s interest in receiving commercial information may be “keener by far” than her interest in “the day’s most urgent political debate.”<sup>224</sup> The Court ruled that the recipients of pharmaceutical advertising had standing to assert their First Amendment rights to challenge a

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<sup>220</sup> *Id.* at 147 (emphasis added).

<sup>221</sup> *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (noting that First Amendment protection for commercial speech is “justified principally by the value to consumers of the information such speech provides”).

<sup>222</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (internal citations omitted).

<sup>223</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>224</sup> *Id.* at 763.

regulation that banned the advertisements.<sup>225</sup> Although the ban was content-based, it focused on a regulation restricting the conduct of the speaker but not the recipient. “Freedom of speech presupposes a willing speaker,” the Court stated, “[b]ut where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both.”<sup>226</sup> The Court noted the “public interest” that a “free flow of commercial information” produces economic decisions that are “intelligent and well informed.”<sup>227</sup> The Court characterized the right as an “independent right . . . to receive information sought to be communicated” and rejected an argument that no right exists when the listener could obtain the information by other means.<sup>228</sup>

In some circumstances, the public’s right to receive is even broader than the expressive rights of citizens or the right to a free press. In *First National Bank of Boston v. Bellotti*, the Court focused on the interests of society at large rather than the expressive rights of corporations themselves to establish that First Amendment rights extend to corporations.<sup>229</sup> The Court reasoned that the Constitution frequently protects interests that are broader than the rights of the parties seeking those protections; namely, “significant societal interests” protected by the First Amendment.<sup>230</sup> The Court thus concluded, “the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from

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<sup>225</sup> *Id.* at 757.

<sup>226</sup> *Id.* at 756.

<sup>227</sup> *Id.* at 765.

<sup>228</sup> *Id.* at 757 n.15 (“We are aware of no general principle that freedom of speech may be abridged when the speaker’s listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated.”).

<sup>229</sup> See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978) (reversing a Massachusetts Supreme Judicial Court decision holding that a corporation has First Amendment protection for its speech only when it can prove that a political issue “materially affects” its property or assets). The state court had articulated the issue as “whether and to what extent corporations have First Amendment rights.” *Id.* The Supreme Court disagreed with that formulation of the issue, reframing it more broadly as whether the challenged statute infringed an expression that the First Amendment was designed to ensure. *Id.*

<sup>230</sup> *Id.* at 776.



limiting the *stock of information* from which members of the public may draw.”<sup>231</sup>

Similarly, the Court raised the right to receive in *Citizens United v. Federal Election Commission* as a justification for its landmark, yet widely controversial, decision in 2010 that upheld political spending by corporations as a mode of expression protected by the First Amendment.<sup>232</sup> Invoking the government accountability function of free speech and the necessity of citizens’ ability to make informed choices in a representative democracy, the Court reasoned that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>233</sup>

One of the Court’s strongest articulations of the right to receive came in *Red Lion Broadcasting Co. v. FCC*.<sup>234</sup> In *Red Lion Broadcasting*, the Supreme Court upheld a rule promulgated by the Federal Communications Commission (FCC) requiring a broadcast licensee to give a person or group attacked for expressing views on a controversial issue of public concern notice of the attack and a reasonable opportunity to respond over the licensee’s airwaves.<sup>235</sup> The Court elevated the rights of viewers and listeners above those of the broadcasters,<sup>236</sup> reasoning that the First Amendment protects an “uninhibited marketplace of ideas in which truth will ultimately

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<sup>231</sup> *Id.* at 783 (emphasis added).

<sup>232</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898, 917 (2010).

<sup>233</sup> *Id.* at 898.

<sup>234</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>235</sup> *Id.* at 373, 400–01.

<sup>236</sup> *Id.* at 390 (“It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”). This analysis of the right to receive came in the context of radio broadcasting, which the Court noted as a resource the government was entitled to restrict due to its scarcity. *Id.* This feature is admittedly not present in the virtually limitless Internet. Additionally, some question exists regarding *Red Lion Broadcasting*’s continuing vitality after the Court’s decision in *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). There, the Court struck down a statute requiring newspapers to give a political candidate news space to reply to criticism in the newspaper’s editorial pages. *Tornillo*, 418 U.S. at 258. The Court concluded that the statute was an unconstitutional attempt by the government to control the content of the newspaper’s editorial pages in violation of the First Amendment. *Id.* The Court has never overruled *Red Lion Broadcasting*, however, and the decision’s articulation of the public’s right to receive was not questioned in *Tornillo*, which does not even cite *Red Lion Broadcasting*.

prevail.”<sup>237</sup> The Court concluded that “[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,” which neither Congress nor the FCC could restrict.<sup>238</sup>

The right to receive information has also been recognized by state courts, legislatures, and common law scholars. In *Tornillo v. Miami Herald Publishing Co.*, the Supreme Court of Florida upheld a statute requiring newspapers to give a political candidate news space to reply to criticism levied on the candidate in the paper’s editorial pages because the public had “a right . . . to the whole story, rather than half of it.”<sup>239</sup> In addition, the Washington State Legislature recognized the general public’s right to health and safety information by enacting a statute stating that “members of the public have a right to information necessary for a lay member of the public to understand the nature, source, and extent of the risk from alleged hazards to the public.”<sup>240</sup> Even the Restatement (Second) of Torts acknowledges common law and constitutional principles that “the public has a proper interest in learning about many matters” and that dissemination of information “of legitimate public concern” does not constitute an invasion of privacy.<sup>241</sup>

These cases and other sources are important to the surreptitious recording of information regarding matters of public importance by public speakers for three reasons. First, the city ordinance in *Martin* and the advertising ban in *Virginia State Board of Pharmacy* criminalized the conduct of the speaker, not the recipient, yet the Court depended on the value of the recipient’s right to receive the

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<sup>237</sup> *Red Lion Broad.*, 395 U.S. at 390.

<sup>238</sup> *Id.*

<sup>239</sup> *Tornillo v. Miami Herald Publ’g Co.*, 287 So. 2d 78, 87 (Fla. 1973). As noted above, the U.S. Supreme Court reversed the Supreme Court of Florida’s decision, invalidating the statute as the government’s attempt to control the content of the newspaper’s editorial pages. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The Court did not, however, address the portion of the Supreme Court of Florida’s opinion recognizing the right to receive. See Wilfrid C. Rumble, Comment, *The FCC’s Reliance on Market Incentives to Provide Diverse Viewpoints on Issues of Public Importance Violates the First Amendment Right to Receive Critical Information*, 28 U.S.F. L. Rev. 793, 801–08 (1994) (discussing *Tornillo* and the Supreme Court’s “right to receive” cases).

<sup>240</sup> WASH. REV. CODE § 4.24.611(2) (2013).

<sup>241</sup> Restatement (Second) of Torts § 652D cmt. d (1977).

information for its holdings.<sup>242</sup> Second, like the Wiretap Act,<sup>243</sup> the statute in *Martin* was content-neutral as it was aimed at the act of door-to-door distribution of literature.<sup>244</sup> Thus, the right to receive information is not reserved for restrictions on content-based information. Finally, the Court in *Martin* recognized the right to receive information as a necessary component of the right to distribute it.<sup>245</sup> This was confirmed in *Red Lion Broadcasting* and *First National Bank of Boston* when the Court elevated the right of the public to receive information of political, social, and moral importance above the interests of the speakers because it was necessary for an “uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>246</sup> Indeed, the public’s right to a full “stock of information” goes beyond the rights of the speaker.<sup>247</sup> While the right of expression and the right to receive go hand in hand, the right to receive should not be viewed as ancillary to the right of expression; the two rights should be understood as co-equals.<sup>248</sup>

Thus, the courts and Congress should recognize that the public’s right to receive information of public importance justifies a more robust intrusion into the arguably private communications of public speakers when those communications regard matters of legitimate public concern. The public needs this information to fully engage its civic duties, not the least of which is voting.<sup>249</sup> People rely on

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<sup>242</sup> See *supra* notes 216–228 and accompanying text.

<sup>243</sup> The Supreme Court has concluded that the Wiretap Act is a content-neutral law of general applicability. *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001).

<sup>244</sup> In fact, the Court did not even consider the religious message of the literature despite the defendant’s timely argument. *Martin v. City of Struthers*, 319 U.S. 141, 142 (1943). If the Court had determined the law was content-based, the First Amendment’s freedom of religion clause would have been implicated.

<sup>245</sup> *Martin*, 319 U.S. at 146–47.

<sup>246</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>247</sup> See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>248</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 n.15 (1976) (characterizing the right to receive commercial speech as an “*independent right* . . . to receive the information sought to be communicated” (emphasis added)).

<sup>249</sup> See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”).

information to make decisions about their careers, where to send their kids to school, where to live, what products to buy, and even where to purchase their food.<sup>250</sup> A free flow of information to the public<sup>251</sup> should not be unreasonably impeded absent a countervailing interest of the utmost degree, which a public speaker's diminished expectation of privacy does not provide.<sup>252</sup>

As the Court recognized in *Garrison v. State of Louisiana*, this free flow of information is not limited to statements or information that are made openly when the public speaker knows people are listening.<sup>253</sup> Rather, it reaches to anything germane to an official's fitness for holding public office, including that which affects the official's private character.<sup>254</sup> At first glance this may seem to be a "total abrogation of the right to privacy,"<sup>255</sup> but the competing interests between the First Amendment and the right to be left alone can be reconciled by the diminished privacy expectations of public speakers.<sup>256</sup> Using its own prerogative to interpret the Constitution, Congress should amend the Wiretap Act to increase protections for newsgathering in just-press-record scenarios to the same level as protections for publication. Anchoring this amendment would be the

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<sup>250</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 765 (explaining that commercial speech is needed to make "intelligent and well informed" choices).

<sup>251</sup> *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (characterizing public officials as "servants" of the people and reasoning that the "free flow of information to the people" about those public officials is a "paramount public interest"); *see also* *Pell v. Procunier*, 417 U.S. 817, 832 (1974) (quoting *Garrison's* "free flow of information" language with approval).

<sup>252</sup> *See supra* Part III.B.1.

<sup>253</sup> *Garrison*, 379 U.S. at 77. The Supreme Court struck down a state criminal defamation statute as unconstitutional under the First Amendment. *Id.* In overturning the conviction of a District Attorney who disparaged eight judges during a press conference, the Court applied the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964), decided the same term, which held that disparaging public remarks about a public official are defamatory only if they are both false and the speaker knew they were false or recklessly disregarded whether they were false. *Garrison*, 379 U.S. at 74.

<sup>254</sup> *Garrison*, 379 U.S. at 77.

<sup>255</sup> *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 42 (Cal. 1971) (en banc) ("[T]he rights guaranteed by the First Amendment do not require total abrogation of the right to privacy."), *holding overruled by* *Gates v. Discovery Commc'ns, Inc.*, 101 P.3d 552, 555 (Cal. 2004).

<sup>256</sup> *See supra* Part III.B.1.

constitutional right of the public to receive information of legitimate public concern reflected in *Martin* and its progeny.

*B. Policy Support for an Exception to Liability Under the Wiretap Act*

Beyond these constitutional protections, Congress should amend the Wiretap Act to permit the interception of oral communications in just-press-record scenarios as a means to reduce the potential for collusive corruption in government bodies—or to maintain the lack thereof. The Supreme Court’s commitment to “uninhibited, robust, and wide open” debate on matters of public importance<sup>257</sup> is well founded as data suggest a strong correlation between a free press and a lack of corruption in society.<sup>258</sup> The necessary link is transparency, which “depends crucially on freedom of the press and expression.”<sup>259</sup> The logic is commonsensical: when public speakers understand that their actions can and will be laid bare before the public, they will be far more likely to conduct their stewardship in a more publicly beneficial way.<sup>260</sup> A free press is not merely necessary to establish a society free from high levels of corruption but is necessary to maintain that status.<sup>261</sup> One study showed that a free press had the greatest correlation with low corruption among four institutional factors including a free press, a strong civil society, political opposition, and an independent judiciary.<sup>262</sup> A free press is a “demonstrated antidote

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<sup>257</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001).

<sup>258</sup> See Aymo Brunetti & Beatrice Weder, *A Free Press is Bad News for Corruption*, 87 J. PUB. ECON. 1801, 1810, 1820 (2003); Daniel Lederman et al., *Accountability and Corruption: Political Institutions Matter*, 17 ECON. & POL. 1, 4–5 (2005); Hung-En Sung, *A Convergence Approach to the Analysis of Political Corruption: A Cross-National Study*, 38 CRIME, L. & SOC. CHANGE 137, 155 (2002); see also Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L.J. 1253, 1269 (2012).

<sup>259</sup> Lederman, *supra* note 258, at 4–5.

<sup>260</sup> *Id.* at 5 (“Freedom of press, so that right- and wrong-doings on the part of the government can be publicized, tends to reduce the informational problem between principals (citizens) and agents (governments), thus improving governance.”).

<sup>261</sup> See Sung, *supra* note 258, at 146–47.

<sup>262</sup> *Id.* at 155.

to widespread political corruption,”<sup>263</sup> a proposition the Supreme Court has supported.<sup>264</sup>

Aymo Brunetti and Beatrice Weder identify two forms of corruption: extortive and collusive.<sup>265</sup> While a free press is instrumental in combating both forms, it is absolutely critical to fighting collusive corruption. The press provides an alternative channel for battling extortive corruption since the private actor being extorted may either seek redress through internal accountability controls housed in the government system itself or, if the internal controls are ineffective due to delay or otherwise, the private actor may report the extortion to the press.<sup>266</sup> Brunetti and Weder posit, however, that a free press is likely the most effective control mechanism for collusive corruption because of journalists’ incentives to expose all wrongdoing.<sup>267</sup> Indeed, if a free press is not permitted to uncover collusion without fear of prosecution, then who will? As Brunetti and Weder suggest, a “substantial danger” exists that those overseeing internal controls built into the government system—useful in fighting extortive corruption, to be sure—will be party to the collusion and “get a share of the pie.”<sup>268</sup> Free and independent journalists are needed to protect against this sort of collusive corruption.

Permitting a person to record oral communications in just-press-record scenarios would aid the fight against both forms of corruption, but would prove especially useful to combat collusive corruption. Take Mr. Romney’s “47 percent” speech, for example. Although not

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<sup>263</sup> *Id.*

<sup>264</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

<sup>265</sup> Brunetti & Weder, *supra* note 258, at 1804. Extortive corruption is defined as a government official exercising discretion to refuse or delay a service in her power to grant in order to procure a rent, otherwise known as a bribe. *Id.* In collusive corruption, the private actor is in on the scheme: the government official and the private actor collaborate, with the government official turning a blind eye to the private actor’s undesirable conduct in exchange for a bribe. *Id.* at 1805.

<sup>266</sup> Brunetti & Weder, *supra* note 258, at 1804.

<sup>267</sup> *Id.* at 1805.

<sup>268</sup> *Id.*

technically an act of collusive corruption as it has been defined here, the speech to private donors could be understood as a quid pro quo. A reasonable person could certainly understand the intended message as something to the effect of, “If you donate money to my campaign, I will be sure to advocate for policies in your best interest. Who needs that other 47 percent anyway, right?” What about the taxi cab driver who picks up a fare plus a little extra from loose-lipped government officials orchestrating a back-room deal? This is a textbook opportunity for a free press to smoke out collusion.<sup>269</sup> If not the press, then whom?<sup>270</sup>

More than just a whistleblower, however, a free press has the power to effect significant change. Watergate is the quintessential example, when determined *Washington Post* reporters Bob Woodward and Carl Bernstein uncovered a scandal that prompted a Senate investigation and the resignation of President Richard Nixon.<sup>271</sup> Although the current state of First Amendment law provides

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<sup>269</sup> Presumably, the taxi cab driver, waiter, or custodian in these just-press-record scenarios could simply tell someone what they heard without recording the communications. However, this is an inadequate alternative to a recording of the communication given the substantially increased credibility and authenticity of the communication if presented to the public in the speaker’s own words.

<sup>270</sup> “Press” used here is meant to encompass traditional print and broadcast reporters, as well as citizen journalists who capture acts of collusive corruption. *See supra* note 140.

<sup>271</sup> MICHAEL EMERY ET AL., *THE PRESS AND AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA* 440–41 (9th ed. 2000). A less known example occurred in 1998, when the *Post* published a multi-part story about a systemic culture that led the D.C. police department to the highest rate of police-shooting fatalities in the country. LEONARD DOWNIE JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* 42–43 (2003). The series prompted D.C. police leaders to institute new mandatory training for its entire force. *Id.* at 50. As a result, the number of police shootings in D.C. fell from thirty-two in 1998 to eleven in 1999, with the number of fatalities dropping during that time period from twelve to four. *Id.* In 2000, the D.C. police killed only one person. *Id.*

A free press is not merely an ideal forced on the people by First Amendment purists. Rather, the public craves complete and reliable information. It is true that news consumption has been dropping for more than a decade in the United States. *See Trends in News Consumption: 1991-2012: In Changing News Landscape, Even Television is Vulnerable*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable> (explaining that newspaper and broadcast news consumption has fallen over the past decade while news consumption via mobile devices and social networks has made up some of the difference). Americans are spoiled by twenty-four-hour news cycles, access to news on their mobile phones, and broad First Amendment protections. A recent episode in China illustrates how willing a deprived public is to fight for access to information. In January 2013, Chinese journalists working for the *Southern Weekend* newspaper went on

much wider protections for U.S. citizens than other countries throughout the world, the U.S. government should not soon forget that “[t]he best accountability reporting reverberates through the culture, reminding malefactors everywhere that they may get caught and exposed. This is what freedom of the press should inspire.”<sup>272</sup>

### C. *Proposed Amendment to the Wiretap Act*

To reflect this ideal, grounded in constitutional principles and statistical data, Congress should amend the Wiretap Act to add an exception allowing a person to record the oral communications of public speakers engaged in communication of legitimate public concern when certain conditions are met. The exception would prevent liability for the audiovisual recording of oral communications uttered by public speakers when the interceptor (1) is lawfully on the premises where the recording takes place, is not committing any other criminal act, and is not otherwise violating a duty of trust and confidence; (2) reasonably recognizes, at the time of the interception, that the communication pertains to a matter of legitimate public concern; (3) distributes the information for the public’s benefit; and (4) does not seek to use the communication in an act of bribery or extortion.<sup>273</sup>

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strike to protest “overbearing censorship by provincial propaganda officials.” Edward Wong, *Demonstrators Rally to Protest Censorship*, INT’L HERALD TRIB., Jan. 8, 2013, at 4. In a show of support, hundreds of demonstrators gathered outside the newspaper’s office in Guangzhou, China, including celebrities and one person carrying a banner that stated: “Get rid of censorship. The Chinese people want freedom.” *Id.*

<sup>272</sup> DOWNIE & KAISER, *supra* note 271, at 51.

<sup>273</sup> The text of the proposed amendment is:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept an oral communication uttered by a public speaker where such person reasonably recognizes at the time of the interception that the communication pertains to a matter of legitimate public concern and the person distributes the information for public benefit, provided that the person is not trespassing, committing other criminal acts, or violating a duty of trust and confidence when such interception occurs. (a) This exception shall not apply if the person who intercepts the oral communication thereafter uses that communication to seek commercial gain or financial benefit through an act of bribery or extortion. “Public speaker” shall be defined to include public officials, candidates for public office, and private persons who insert themselves into public affairs and communicate about matters of public concern.



This proposed exception would contribute to the “uninhibited marketplace of ideas in which truth will ultimately prevail,” would add to the “stock of information” available to the public in making important decisions, and would reflect the right of the public to receive information of legitimate public concern, a right that stands independent as co-equal to the right of expression.<sup>274</sup> It also accounts for concerns that the expansion of the First Amendment in this regard would allow reporters and citizen journalists with smartphones to run amuck, breaking all manner of laws and infringing a public speaker’s legitimate privacy interests with impunity.

First, the requirement that a person not be trespassing or otherwise breaking the law when recording the oral communication recognizes the holding of *Cohen* that the press is not exempt from generally applicable laws.<sup>275</sup> As the Court in that case reasoned, “[t]he press may not with impunity break and enter an office or dwelling to gather news” or publish copyrighted material without regard to the copyright laws.<sup>276</sup> Likewise, in concluding that the ACLU would likely succeed on a First Amendment claim in a case analogous to the just-press-record scenarios, the Seventh Circuit considered it important that proposed interceptors of police activity would have a legal right to be in the location where the recording was made and would not disrupt safety or the public order through such interceptions.<sup>277</sup>

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<sup>274</sup> See *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>275</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). But see *Katz v. United States*, 389 U.S. 347, 351 (1967) (explaining that the Fourth Amendment, which often is considered a constitutional basis for a right to privacy, “protects people, not places”). However, *Katz* dealt with an electronic recording device installed in a phone booth by law enforcement. *Id.* at 348. The Fourth Amendment applies only to unreasonable searches by the government. U.S. CONST. amend. IV; *Katz*, 389 U.S. at 350. Indeed, *Katz* itself contemplated that the Constitution does not protect a general right of privacy between private persons, but that “a person’s general right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States.” *Katz*, 389 U.S. at 350–51 (footnote omitted). Of course, this Note addresses communications not by private persons but public speakers who have a diminished expectation of privacy. See *supra* Part III.B.1.

<sup>276</sup> *Cohen*, 501 U.S. at 669.

<sup>277</sup> *ACLU v. Alvarez*, 679 F.3d 583, 606 (7th Cir. 2012). In just-press-record scenarios, the taxi cab driver who records the conversation of government officials certainly would not be trespassing in her own cab. The custodian would not be trespassing in the union leader’s office while performing his job of emptying the wastebaskets. The presence of the waiter at the booth where corporate officers discuss a factory relocation that would be devastating to a community is not unauthorized. Lastly, the recording of a private campaign fundraiser,

Second, requiring the interceptor to reasonably recognize the relevance of the speaker's communication to a matter of legitimate public concern at the time she intercepts it eliminates the possibility of fishing expeditions. This objective standard would protect the First Amendment rights of the interceptor and the public, while also protecting the legitimate privacy interests of the speaker. To that end, the smartphone-wielding potential interceptor would not be allowed to surreptitiously record all of the speaker's communication in the hope of capturing something of public importance while at the same time recording much that is entirely private. While this might limit the content that is ultimately recorded—in some instances the communication may end before the interceptor has the opportunity to press record—such a limitation is necessary to ensure the First Amendment does not eviscerate all privacy interests by allowing recorders to intercept information personal to the speaker.

Lastly, limiting the manner in which the recorder may use the information prevents the recorder from using the right to receive as a pretext for improper private benefit.<sup>278</sup> The interceptor may not use the information for collusion, extortion, or bribery. This provision is modeled after another section of the Wiretap Act that provides an exception for the interception of unencrypted satellite transmissions when (1) those interceptions are disseminated to a broadcaster for transmission to the general public and (2) the interception is not done with the purpose of realizing “direct or indirect commercial advantage or private financial gain.”<sup>279</sup>

This element implicates the interceptor's potentially mixed motivations for pressing the record button. An analogy may be drawn from courts' analysis of public employee speech. The Seventh Circuit has reasoned that a public employee's speech “born of pure personal interest” does not pertain to a matter of public concern but mixed motives that include some personal and some public reasons does not

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whether carried out by an event patron or a member of the catering staff, is not conducted by a trespasser.

<sup>278</sup> This would not prevent a person from selling the information for private financial gain outside the bribery or extortion context. See Chrysanthé E. Vassiles, Note, *Checkbook Journalism: It May Involve Free Speech Interests but It is Not Free; Can Witnesses Be Prohibited from Selling Their Stories to Media Under the First Amendment?*, 56 OHIO ST. L.J. 1619, 1644 (1995) (arguing that a statute prohibiting eye witnesses from selling information to the news media is unconstitutional under the First Amendment).

<sup>279</sup> 18 U.S.C. § 2511(4)(b) (2014). This provision provided the general idea behind, but does not directly parallel, the proposed exception. Indeed, questions have been raised about the constitutionality of statutes such as § 2511(4)(b). See generally Vassiles, *supra* note 278.

lose protection.<sup>280</sup> The Ninth Circuit has similarly concluded that personal employment concerns that are “intertwined” with a matter of public concern may still, on balance, pertain to a matter of public concern.<sup>281</sup> “Mixed speech”—that is, speech that involves both public and private matters—may be protected so long as it “touches on a matter of public concern.”<sup>282</sup> By inverse reasoning, it is logical to condition protection for interceptors in just-press-record scenarios on the distribution of the information for the public’s benefit. This need not be an interceptor’s sole motivation, but it would prevent her from receiving protection for an act of bribery or extortion. Thus, the public’s right to receive would be promoted without allowing interceptors to exploit a public speaker’s legitimate interest in maintaining privacy.

An argument may be raised that allowing the surreptitious recording of public speaker communications in just-press-record scenarios would chill public speakers from engaging in open and frank communications regarding important decisions affecting the community. This is an important concern and one that is built into the narrow amendment proposed herein. First, the amendment applies only to oral communications by public speakers who already have a

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<sup>280</sup> *Miller v. Jones*, 444 F.3d 929, 937–39 (7th Cir. 2006) (holding that a Milwaukee police officer who openly opposed the merger of the Police Athletic League and the Boys and Girls Club had spoken as a citizen upon a matter of public concern). The court analyzed the speaker’s motivation and circumstances under the “context” prong of the *Connick*’s “content, form, and context” test. *See id.* at 935, 937; *Connick*, 461 U.S. at 147–48. The court reasoned that where there is “no suggestion of public motivation,” the statement is more likely to involve purely personal reasons, but where the statement arose out of the exercise of the employee’s discretionary functions and independent judgment, he was more likely to be speaking as a citizen upon matters of public concern. *Miller*, 444 F.3d at 937.

<sup>281</sup> *Pool v. VanRheen*, 297 F.3d 899, 908 (9th Cir. 2002) (construing *Connick* and *Rankin* as suggesting that the employee’s speech motive is a factor to be considered under the context prong and concluding that a female African American police lieutenant who was critical of the police department’s treatment of minorities at a meeting covered by the media and was demoted for her actions had spoken on a matter of public concern). The court rejected the defendant’s argument that Pool had “turn[ed] her job problems into a cause celebre” because her commitment to race and gender equality during her whole career demonstrated that even if personal reasons were a motivation for her speech, her motives were mixed. *Id.*

<sup>282</sup> *Banks v. Wolfe Cnty. Bd. of Educ.*, 330 F.3d 888, 894 (6th Cir. 2003) (holding that where an aide was passed over for several teaching positions, a complaint letter she sent to the school’s board of education about the school’s hiring practices fell into the “mixed speech category” because she also testified that the school’s broader hiring policies and procedures were her “primary concern”).

diminished expectation of privacy. It does not apply to wire or electronic communications, nor does it apply to oral communications uttered by private persons. Second, the amendment should not chill public speakers from engaging in frank discussions with trusted confidants. The amendment reflects the D.C. Circuit's en banc decision in *Boehner* that the First Amendment does not protect persons with a duty of trust and confidence from sanctions for intercepting the communications of those to whom they owe the duty or for disclosing the contents of such an interception.<sup>283</sup> Public speakers could presumably take precautions by contractually establishing this duty of trust and confidence with their aids and other agents. Finally, public speakers should not be chilled from engaging in frank communications in a controlled environment—e.g. behind closed doors in their personal office or a private conference room—because the exception would not permit the interception of their communications by anyone not in that environment.

In a society in which nearly every member owns or has access to a recording device as small and unassuming as a cell phone, a public speaker should be on notice that another person may record his sensitive but publicly important conversations. When he is aware or should be aware of that person's presence, he should not be allowed to hide behind wiretap laws. The First Amendment demands as much through the public's right to receive, and Congress should demand the same by amending the Wiretap Act to add an exception allowing the interception of oral communications uttered by public speakers when the interceptor (1) is lawfully on the premises where the recording takes place, is not otherwise committing a crime, and is not otherwise violating a duty of trust and confidence; (2) reasonably recognizes, at the time of the interception, that the communication pertains to a matter of legitimate public concern; (3) distributes the information for the public's benefit; and (4) does not seek to use the communication in an act of bribery or extortion.

## V. CONCLUSION

Two damaging consequences result when reporters and citizen journalists are not permitted to record the oral communications of public speakers in just-press-record scenarios. First, a lack of transparency in society's centers of power may produce a potential for

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<sup>283</sup> See *supra* note 134 for a discussion of *Boehner v. McDermott*, 484 F.3d 573, 580–81 (D.C. Cir. 2007).

collusion that could harm the general public. Second, that same public could be deprived of information needed to make informed, intelligent choices about many of life's major and more routine matters. The Wiretap Act as currently drafted is out of date with regard to advancements in modern audiovisual technology, susceptible to variant judicial interpretations depending on the jurisdiction, and adds to its complexity with myriad vaguely defined exceptions.<sup>284</sup> These features of the Act endanger the First Amendment rights of the press, the rights of reporters and citizen journalists to gather news, and the public's right to receive information.

These First Amendment rights outweigh the privacy interests protected by the Wiretap Act when the intercepted oral communications are uttered by public speakers whose positions in the public eye diminish their expectations of privacy.<sup>285</sup> While a public speaker retains a legitimate privacy interest in certain personal communications, that interest decreases as First Amendment protection for the publication of information regarding that communication increases when it pertains to a matter of legitimate public concern.<sup>286</sup> The "prerequisite" to a right of publication<sup>287</sup>—newsgathering—deserves similar protection. When generally applicable laws like the Wiretap Act have more than incidental effects on newsgathering activities, Congress must recognize that general protections for newsgathering and the public's right to receive raise constitutional protections for newsgathering to the same level as protections for publication.<sup>288</sup>

As James Madison recognized, the line between the abuse and proper use of the press is a fine one, and one cannot be found without the other.<sup>289</sup> However, the public's right to receive places the

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<sup>284</sup> See *supra* Part II.

<sup>285</sup> See *supra* Part III.B.1.

<sup>286</sup> See *supra* Parts III.A and III.B.2.

<sup>287</sup> See Easton, *supra* note 136, at 1140.

<sup>288</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("Nor is it suggested that news gathering [sic] does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.").

<sup>289</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 388–89 (1967) ("As James Madison said, 'Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.'").

interception of oral communications uttered by public speakers in just-press-record scenarios squarely on the “proper use” side of the line. The Supreme Court has recognized that the public has a right to inquire, a right to hear, and a right to a complete stock of information.<sup>290</sup> Put another way, the public has a right to know about matters that affect their daily lives and influence their decisions about where to shop, where to send their kids to school, where to live, and for whom to vote. Congress should amend the Wiretap Act to permit reporters and citizen journalists to surreptitiously record the oral communications of public speakers when those communications pertain to a matter of legitimate public concern. Public speakers who willingly put themselves in the public eye should not be permitted to hide behind wiretap statutes when a gaffe like Mr. Romney’s “47 percent” speech threatens to knock them down a few points in the election poll. The public, and the journalists who serve that public, deserve no less.

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<sup>290</sup> See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).